Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN, MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN, MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN and ROBERT LES,

Petitioners,

vs.

BRUCE S. MARKS, KATHY STECK, EMANUEL LORENZO, LYDIA COLON, LILLIAN CRUZ, DIANA IRIZARRY, RUTH MARTINEZ, ZORAIDA RODRIGUEZ, YESENIA VASQUEZ, AND THE REPUBLICAN STATE COMMITTEE,

-and-

WILLIAM STINSON, THE WILLIAM STINSON CAMPAIGN, AND THE PHILADELPHIA COUNTY BOARD OF ELECTIONS (MARGARET M. TARTAGLIONE, JOHN F. KANE, ALEXANDER Z. TALMADGE, JR.),

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a state senatorial election tainted by fraud, was it proper for the federal district court to take the unprecedented step of declaring the defeated candidate the winner of that election or should the federal court have set aside the results of the state election and ordered that a new election be held so that the voters of Pennsylvania's Second Senatorial District could choose their own representative?

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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN, MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN, MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN, AND ROBERT LES,

Petitioners,

V.

BRUCE S. MARKS, KATHY STECK, EMANUEL LORENZO, LYDIA COLON, LILLIAN CRUZ, DIANA IRIZARRY, RUTH MARTINEZ, ZORAIDA RODRIGUEZ, YESENIA VASQUEZ, AND THE REPUBLICAN STATE COMMITTEE,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioners, Ida Dougherty, Daniel J. Sears, Josephine Martin, Mary Martin, Joseph J. Jordan, Anne Jordan,

Mary Sullivan, Mary Mendoloski, Anna Hagan, and Robert Les, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on August 18, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit dated August 18, 1994 is not reported, and is reprinted in the appendix hereto at A1–A11. Circuit Judges Stapelton, Greenberg and Cowen comprised the panel of the court. Circuit Judge Greenberg authored the court's unpublished memorandum opinion.

The opinion of the United States District Court for the Eastern District of Pennsylvania, per Senior District Judge Newcomer, dated April 26, 1994 is not reported, and is reproduced in the appendix hereto at B1–B81.

The opinion of the Court of Appeals for the Third Circuit dated March 16, 1994 is reported at 19 F.3d 873 (3d Cir. 1994), and is reprinted in the appendix hereto at C1–C45, as amended D1–D4. Circuit Judges Stapelton, Greenberg and Cowen comprised the panel of the court. Circuit Judge Stapelton authored the court's published opinion.

The opinion of the United States District Court for the Eastern District of Pennsylvania, per Senior District Judge Newcomer, dated February 17, 1994 is not reported, and is reproduced in the appendix hereto at E1–E35.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on August 18, 1994. Rehearing was not requested. Jurisdiction to review

the judgment of the United States Court of Appeals for the Third Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254 (1) (1988).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved in this case:

1. Article 4, Section 4, Clause 1, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. CONST. art. IV, § 4, cl. 1.

2. The Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

3. Article 3, in its entirety, U.S. CONST. art. III, which is set forth in the Appendix at F1–F2.

The following provisions of the United States Code are involved in this case:

1. Section 1983 of Title 42 (Civil Action for Deprivation of Rights), which is set forth in the Appendix at G1.

2. Section 1988 of Title 42 (Proceedings in vindication of civil rights; attorney's fees; expert fees), which is set forth in the Appendix at H1.

3. Section 1971 of Title 42 (Voting Rights), which is set forth in the Appendix at I1–I8.

4. Section 1973 of Title 42 (Denial or abridgement of right to vote on account of race or color through voting qualification or prerequisites; establishment of violation), which is set forth in the Appendix at J1.

STATEMENT OF THE CASE

On November 2, 1993, a special state election was held in Philadelphia, Pennsylvania between Republican candidate Bruce S. Marks (hereinafter "Marks") and Democratic candidate William Stinson (hereinafter "Stinson") to fill a vacancy in the Pennsylvania State Senate for the state's Second Senatorial District. Petitioners all voted by absentee ballot in said election. Marks received a plurality of votes cast at the machines (19,691 for Marks and 19,127 for Stinson), but when 1,757 absentee ballots were also counted (366 for Marks and 1,391 for Stinson), Stinson was the overall winner of the state senatorial election by a margin of 461 votes. Stinson was thus certified as the winner of the election, and sworn in as the State Senator for the Second Senatorial District of Pennsylvania.

On November 22, 1993, following various state court election contest proceedings not relevant to the instant petition,[1] Marks, the Republican State Committee, and eight other individual voters filed a civil action in the United States District Court for the Eastern District of Pennsylvania against Stinson, the Stinson Campaign, and the Philadelphia County Board of Elections. Marks and the others invoked the district court's federal question jurisdiction, alleging violations of the Civil Rights Act, 42 U.S.C. § 1983, and the Voting Rights

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[1]The state court proceedings are, however, relevant to the abstention issues that will be raised by Stinson in his Petition for a Writ of Certiorari, due to be filed in this Court by November 16, 1994.

Act, 42 U.S.C. §§ 1971, 1973, all in connection with the handling of absentee ballots during the state senatorial election. Specifically, Marks and the others claimed that the Stinson Campaign and the County Board of Elections conspired to steal the election from Marks, that toward this end the Stinson Campaign solicited and the County Board processed absentee ballots "in bulk," and that said ballots were delivered to and picked up from absentee voters by paid campaign workers in violation of Pennsylvania election law.

On December 22, 1993, plaintiffs filed an amended complaint and moved for preliminary injunctive relief, asking, *inter alia*, that Stinson be removed from state office *pendente lite*. On February 17, 1994, following a four day hearing, the United States District Court for the Eastern District of Pennsylvania, per the Honorable Clarence C. Newcomer, concluded that there had been a "massive fraud" perpetrated by Stinson and the County Board of Elections in connection with their handling of absentee ballots during the election, and ordered that Stinson be removed from office. The district court then took the unprecedented step of declaring that the defeated candidate in the state senatorial election (Marks) was the winner thereof; the district court directed that the state senatorial election results be recertified on the basis of only those votes cast at the machines, thereby invalidating all 1,757 absentee ballot votes cast.

This unprecedented relief disenfranchised Petitioners (who had each voted by absentee ballot) and all other legitimate absentee ballot voters. Thus, on March 2, 1994, Petitioners commenced a mandamus action in the United States Court of Appeals for the Third Circuit against the Honorable Clarence C. Newcomer. *Dougherty, et al. v. Newcomer*, No. 94-1295 (3d Cir. 1994). By their action, Petitioners challenged only the certification component of the district court's preliminary injunction order. On March 9, 1994, the Third

Circuit denied the mandamus petition as such, but treated it as an application to intervene in the defendants' consolidated appeals from the district court's preliminary injunction order, and granted intervention.

On March 16, 1994, concluding that Petitioners and other legitimate absentee voters had been unconstitutionally disenfranchised by the district court, the Third Circuit granted precisely the relief sought by Petitioners, *i.e.*, it vacated that portion of the district court's February 17, 1994 preliminary injunction order that required "the decertification of the candidate previously declared to be the winner [Stinson] and the certification of his opponent [Marks]." *Marks v. Stinson*, 19 F.3d 873, 875 (3d Cir. 1994) (*"Marks I"*). The Third Circuit concluded that the district court's decision to disregard the entire absentee vote and declare Marks the winner was improper. *Id.* at 886–90. The Third Circuit first noted that the district court had not found that Stinson failed to receive a plurality of the legally cast votes, or that Marks in fact received a plurality of the legally cast votes. *Id.* at 886. The Third Circuit then noted that "Marks' only claim of authority to exercise the people's delegated power rests upon his receiving a majority of the votes cast on the voting machines." *Id.* at 887. The Third Circuit continued, however, that "[e]quating the machine vote with the will of the electorate disenfranchises the voters [like Petitioners] who cast legal absentee ballots. Moreover, it fails to take into account the will of the electors who would have voted at the polling places but who unknowingly cast illegal absentee ballots relying on assurances that were an integral part of the [fraud] scheme...." *Id.* As the Third Circuit emphasized, "the public's interest in having legislative power exercised only by those to whom it has been legally delegated[,]... is not served by arbitrarily ignoring the absentee vote, a substantial but undetermined portion of which was either legally cast or came from voters who would have gone to the polls but for the fraud." *Id.* at

888. The Third Circuit accordingly reversed that portion of the district court's preliminary injunction that required the Board of Elections to certify Marks as the state senator for Pennsylvania's Second Senatorial District, and remanded the case to the district court for further proceedings consistent with *Marks I*. *Id.* at 889–90.

The Third Circuit stated that, on remand, the district could order a new election upon proof of a constitutional violation. *Id.* at 889. The Third Circuit also stated that the district court could declare the senate seat vacant and leave the question of a new election to the appropriate state authorities. *Id.* at 889–90. The Third Circuit warned, however, that the district court "should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for the wrongdoing." *Id.* at 889. The Third Circuit added, by way of footnote, that the determination of whether the designated candidate would have won the election but for the wrongdoing need not be made with "mathematical precision[,]" noting that courts, "with the aid of expert testimony have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence." *Id.* at 889 n.14 (*citing Curry v. Baker*, 802 F.2d 1302, 1317–19 (11th Cir.), *stay denied*, 479 U.S. 1301, *cert. denied*, 479 U.S. 1023 (1986)).

A nine day trial of this matter commenced in the federal district court on March 28, 1994. At trial, three expert witnesses (including a court–appointed expert) were called to opine on whether Marks would have won the election but for the wrongdoing. Marks' expert testified that Marks would have won the election but for the wrongdoing, and based his opinion on data collected by Marks Campaign workers in surveys conducted of absentee voters for the purpose of gathering evidence for an election contest. The court's expert

testified that based upon the relationship between the machine and absentee votes in past elections, it was highly unlikely that Stinson's victory over Marks by virtue of the absentee ballot was due to chance. Petitioners' expert (who rendered his services on a *pro bono* basis, as have Petitioners' counsel) testified that there were simply too many "imponderables" to be able to conclude which of the candidates would have won the election but for the wrongdoing.

On April 26, 1994, the district court issued its final order and opinion, B1–B81, which, in the part pertinent to Petitioners, recertified Marks as the State Senator for Pennsylvania's Second Senatorial District. In large part mirroring the opinion it issued in support of preliminary injunctive relief (*compare* B1–B81 *with* E1–E35), the district court found as a matter of Pennsylvania state law that the absentee ballot package (*i.e.*, the package containing the absentee ballot itself) must be mailed or personally delivered by the County Board of Elections to the voter. B67–B68, ¶ 8; B7–B8, ¶ 22. Likewise, the district court found that completed absentee ballots (*i.e.*, ballots that have been "voted") must be returned by the voter either mailing in the ballot or bringing the ballot personally to the County Board of Elections. B7–B8, ¶ 22; B8, ¶ 24; B68, ¶ 9. The district court then found that there had been the delivery and pick–up of absentee ballots "in bulk" by persons other than the voters themselves (or County Board employees), including by paid campaign workers, and that these constituted "illegal votes." B14, ¶ 43; B15, ¶ 47; B16, ¶ 50. Without making a finding as to the actual number of these "illegal" votes or to the identity of the voters, the court found that "hundreds" of absentee ballots, and in any event more than 462 absentee ballots (representing Stinson's margin of victory plus one to break a tie), had been delivered and picked up by partisan workers and that this delivery and pick–up of absentee ballots "in bulk" constituted a "massive fraud" on the electorate. *See generally* B14, ¶ 43; B16, ¶ 50;

B18, ¶ 56; B38, ¶ 134; B44, ¶ 154; B63, ¶ 212. Relying then upon the opinions of the expert witnesses, the district court concluded that but for this "massive fraud," Marks would have won the state senatorial election. B62–B63, ¶ 211; B75, ¶ 21. Accordingly, the federal district court ordered that Marks be recertified as the winner of the state senatorial election. B75, ¶ 21.

Petitioners immediately appealed the district court's order to the United States Court of Appeals for the Third Circuit; their appeal was consolidated and expedited with the appeals of the defendants. In an unpublished memorandum opinion dated August 18, 1994, *Marks v. Stinson*, Nos. 94–1474, 94–1475, 94–1476, 94–1481 and 94–1482 (3d Cir.) ("*Marks II*"), the Third Circuit affirmed the district court's April 26, 1994 order recertifying Marks (the defeated candidate) as the winner of the state senatorial election. The Third Circuit did not analyze the appropriateness of the district court's chosen remedy; it made only the bare–bones conclusion that it was "satisfied with the soundness of the district court's conclusions that the defendants violated section 1983, and that but for these violations Marks would have won the election." A7.

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This case presents an important question for this Court's consideration: to the extent there exists reliable, competent, admissible evidence of state election fraud sufficient to constitute a federal constitutional violation, what remedial action is properly taken by a federal court to correct that violation? Petitioners submit that the unprecedented decision by the federal district court to certify as the winner the defeated candidate in a state senatorial election represents such

a significant departure from the accepted and usual course of federal judicial proceedings and such a significant intrusion by the federal judiciary on the state electoral process as to call for immediate review by this Court. SUP. CT. R. 10.1 (a), (c).

The unprecedented decision by the federal court to certify the loser of a state senatorial election as the winner thereof has no support either in pertinent federal law or in the record below. First, no federal court has ever remedied wrongdoing in a state election by declaring the loser of the election the winner thereof. Second, neither the Civil Rights Act (relied upon by both the Third Circuit and the district court) nor the Voting Rights Act (relied upon only by the district court) provide for such a drastic remedy. *See* 42 U.S.C. §§ 1983, 1988 (a) (Civil Rights Act); 42 U.S.C. §§ 1971, 1973 (Voting Rights Act). Third, the record in this case does not, because it cannot, establish with mathematical certainty that the defeated candidate would have won the election, at least by a plurality of one vote, but for the wrongdoing therein.

Moreover, the district court's unprecedented decision, and the court of appeals' refusal to correct it, threaten our representative form of government. It is the right of the people to select their representatives, and that right is secured by the United States Constitution. U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government....), and amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

In a democratic society, elected representatives are chosen by a plurality of the voting electorate. Elected officials

are not appointed or chosen by courts[2] -- particularly under circumstances where the person being appointed or chosen by a court ran in an election for the position, garnered only a minority of votes at said election, and there is no proof whatever that said person would have won the election by at least one vote had the election been free from fraud or other wrongdoing. To allow the loser to be transformed into the winner by judicial fiat not only deprives the voting electorate of their fundamental right to choose their representatives (U.S. CONST. art. IV, § 4, cl. 1 and amend. X), but diminishes their confidence in the electoral process as well.[3]

A careful analysis of the relevant federal decisional law makes clear that, upon finding that the state senatorial election was tainted by fraud, the federal court here should have gone no further than to invalidate the state election and order a new election. Further, even assuming that this Court can conceive of circumstances under which it would be appropriate for a federal court to take the unprecedented step of directing that a defeated candidate for state office be certified as the elected representative of the voters, those circumstances are clearly not present on the record in this case.

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[2]The power of the federal judiciary does not include the power to elect the people's representatives. *See* U.S. CONST. art. III.

[3]As the Third Circuit correctly observed in *Marks I*:

> The integrity of the election process lies at the heart of any republic. The people, the ultimate source of governmental power, delegate to their elected representatives the authority to take measures which affect their welfare in a multitude of important ways. When a representative exercises that authority under circumstances where the electors have no assurance that he or she was the choice of the plurality of the electors, the legitimacy of the government actions taken is suspect.

19 F.3d at 887.

Petitioners note at the outset that the power of the federal courts to invalidate state elections upon proof of a federal constitutional violation is not in dispute. As the Third Circuit correctly observed in *Marks I*: "[W]here there is substantial wrongdoing in an election, the effects of which are not capable of quantification but which render the apparent result an unreliable indicum of the will of the electorate, courts have frequently declined to allow the apparent winner to exercise the delegated power." *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994) (*citing Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967)). Thus, if the district court was satisfied by reliable, competent, admissible evidence that the state senatorial election was so tainted by fraud as to constitute a federal constitutional violation, then the court could properly "restrain[] Stinson from exercising the powers that are delegated to a senator by the people...." *Marks I*, 19 F.3d at 887. The court could also call a special election, *id.* at 889, or "simply invalidate the election, declare that there is a vacancy, and leave the decisions concerning a special election and the timing thereof to the appropriate state authorities." *Id.*

In dispute here is the power of a federal court to certify the defeated candidate in a state senatorial election as the winner of that election, under circumstances where it is impossible to know whether the defeated candidate in fact would have won the election but for the wrongdoing committed in the election. Put another way, is it proper for a federal court to pronounce the loser of a state election as the winner, absent "mathematical certainty" that the loser would have won the election but for the wrongdoing? In *Marks I*, the Third Circuit incorrectly suggested an affirmative response, when first it directed that the district court could not recertify Marks "unless and until [it] is satisfied that Marks would have won the election but for the wrongdoing," *id.* at 887, and then stated, in a footnote, that "[w]e do not suggest that such a finding [*i.e.*, that the candidate designated by the district court

for certification would have won the election but for the wrongdoing] would have to be made with *mathematical precision*." *Id.* at 889 n. 14 (emphasis added). On remand, both the district court and plaintiffs seized on the latter point as a basis for recertifying Marks because, as everyone recognized and plaintiffs conceded, no one could determine with mathematical certainty whether Marks would have really won the election but for the wrongdoing.

A critical analysis of whether the remedy chosen by the district court, and sanctioned by the court of appeals, would ever be appropriate begins with two federal appellate decisions cited by the Third Circuit in *Marks I* -- arguably the two leading federal decisions wherein state elections were invalidated -- namely, *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), and *Curry v. Baker*, 802 F.2d 1302 (11th Cir.), *stay denied*, 479 U.S. 1301, *cert. denied*, 479 U.S. 1023 (1986). *Griffin* involved a special Democratic primary election for a vacancy on the Providence, Rhode Island, City Council. 570 F.2d at 1066. One candidate, McCormick, won the machine vote but, when the absentee vote[4] was added to the machine vote, another candidate, Griffin, won the election. *Id.* at 1067. There were 131 absentee votes cast in the election; eight had been invalidated during the canvassing process, leaving 123 as counted. *Id.* McCormick mounted a successful state court challenge to the use of absentee ballots in the primary election (while their use in primary elections had been a seven year practice in Rhode Island primaries, there was no statute authorizing their use in primary elections). *Id.* As a result of the state court proceedings, the 123 absentee ballots were invalidated, Griffin's certification as the winning candidate was quashed, and McCormick was certified as the Democratic

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[4]At issue in *Griffin* was both "absentee" and "shut-in" voting. For the sake of convenience, Petitioners refer to both herein as "absentee" voting.

nominee. *Id.* at 1068. The Rhode Island Legislature swiftly enacted a statute authorizing absentee voting in primary elections. *Id.* Griffin and two absentee voters sought relief in federal court. *Id.*

Following a preliminary hearing, the federal district found that the state's voiding of the entire absentee vote, under circumstances where the absentee voters cast their absentee votes in accordance with the procedures announced by state officials, constituted a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1069. The federal district court went on to find that the absentee vote had affected the outcome of the election, and that the most appropriate equitable relief "was to invalidate the March 29 primary, postpone the general election, and schedule a new primary and election in which the ground rules were clear." *Id.*[5]

The United States Court of Appeals for the First Circuit affirmed. Mindful that the power of the federal court to *invalidate* a state election is "'drastic, if not staggering ... and therefore a form of relief to be guardedly exercised[,]'" *id.* at 1076 (citation omitted), the First Circuit found "this to be one of the perhaps exceptional cases where a district court could properly exercise the limited supervisory role that such courts have in election cases." *Id.* at 1079. Importantly, the First Circuit specifically stated that the district court correctly did not revalidate the absentee ballots that the state court had previously invalidated (which would have restored Griffin to

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[5]McCormick immediately appealed the district court's decision. The court of appeals denied McCormick's application for a stay of the newly ordered primary election which was held prior to the court of appeals' decision in *Griffin*. As in the first primary, McCormick won the machine vote, but when the absentee vote was added to the machine vote, Griffin was the winner.

his status as the Democratic nominee). *Id.* Instead, the district court "ordered a new primary, which had the virtue of giving voters a further chance, in a fair election, to express their views." *Id.*

McCormick, who by that time had already lost the second primary, *see, supra* p. 14 n. 5, argued that plaintiffs, "gauged by an 'outcome' standard," had "failed to establish that enough of the ... absentee voters [from the first primary] would have voted in person to have altered the result." 570 F.2d at 1079. Since the margin of victory on the total count was only 15, McCormick argued that "to overcome McCormick's machine count lead of 90 votes, Griffin had to show that at least 91 of the 123 absentee ... voters would have voted at the polls for him." *Id.* The First Circuit disagreed -- and this is critical -- stating that "the district court was not obliged *as a condition to ordering a new election*, to require the plaintiffs to produce 91 voters who would swear that they would have voted in person." *Id.* (Emphasis added). From here, the First Circuit went on to state as follows (and, again, the distinction from what occurred in the instant case is critical):

> Given the evidence of some voters -- including two who were severely handicapped -- that they would have voted in person, and the importance of the right to vote, the court could infer that it was more likely than not that a very significant proportion of those voting by absentee ballot would have gone to the polls had such ballots not been available. *While the "outcome" test provides a sensible guideline for determining when federal judicial invalidation*

> *of an election might be warranted, it is not a principle requiring mathematical certainty.*

Id. at 1080 (emphasis added). Thus, *Griffin* teaches that a federal district court need not be mathematically certain about who would have won an election but for the wrongdoing if the district court decides to exercise the "drastic, if not staggering" power to *invalidate* a state election and *order a new election*. *See also Navedo v. Acevedo,* 752 F. Supp. 523, 528–29, 545 (D.P.R. 1990), *aff'd*, 932 F.2d 94 (1st Cir. 1991); *Devine v. Rhode Island*, 827 F. Supp. 852 (D.R.I. 1993). *Griffin* does not opine on the quantum of proof necessary to empower a federal district court to certify as the winner a defeated candidate in a state election.

In *Griffin*, unlike here, the district court was confronted with how to add proper votes that had been improperly subtracted back into the total -- not with how to subtract improper votes from the total. Of significance is the fact that the district court in *Griffin* declined to revalidate the properly cast absentee votes that had been improperly invalidated because, as the court eloquently stated:

> The electoral processes of this community must work fairly, and must be seen to have worked fairly -- and worked by the people. There must not be any lurking suspicion that a court, and not the people, has somehow chosen a primary nominee.
>
> I have therefore determined to order the defendants to conduct another primary election. The state defendants have agreed that this seems to be the proper remedy in this case, and have informed the Court that they consider it a remedy less intrusive into the state's political

> process than revalidation would be in light of the Rhode Island Supreme Court's decision in *McCormick v. State Board of Elections*. Although a new election cannot replicate the conditions of the March 29 election, each qualified voter will have a full opportunity to cast a ballot, and to have that ballot counted. The Constitution demands no less, and the Court can do no more.

Griffin v. Burns, 431 F. Supp. 1361, 1369 (D.R.I. 1977).

There are other significant differences between the case *sub judice* and *Griffin*. In *Griffin*, unlike here, there was no doubt about the precise number of votes at issue. The number of votes was indisputably clear: 123. A question confronting the First Circuit was whether proof as to ***how*** those 123 voters would have voted at the polls was a prerequisite to ordering a new election. As noted above, the First Circuit held that it was not. Another critical difference between this case and *Griffin* is that when the district court in *Griffin* gingerly took the "drastic, if not staggering" step of invalidating the state election and then ordering a new election, at issue was a ***primary*** election. No candidate was empowered as a representative of the people by the district court in *Griffin*. *Griffin* thus stands in stark contrast to what the district court in this case has done, and what the court of appeals allowed, by seating a defeated candidate in the Pennsylvania State Senate.

Equally significant to a critical analysis of the proper remedy here are the decisions in *Curry v. Baker*, 802 F.2d 1302 (11th Cir.), *stay denied*, 479 U.S. 1301, *cert. denied*, 479 U.S. 1023 (1986), and its predecessor case, *Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986). As explained

below, *Curry* and *Henderson* support Petitioners' observation and argument that when the federal courts speak of not requiring "mathematical certainty" in these election cases, they are speaking only in the context of invalidating past elections and ordering new elections, and not in the broader context of having the federal courts also unilaterally decide the state elections by seating defeated candidates in state office.

The controversy in *Curry* began in the months preceding a June 3, 1986 primary election in Alabama when certain "Republican officials and candidates who were running for local offices [told] voters they would not lose their right to vote in a Democratic gubernatorial runoff by voting in the Republican primary." *Henderson*, 641 F. Supp. at 1196. This advice was contrary to the rules of the Alabama Democratic Party which prevented voters who voted in a Republican primary election from "crossing over" and voting in a Democratic run-off election that followed. *Id. at 1194-95.* "As the June 3 primary drew near, the claims ... that crossover voting was permitted intensified." *Id.* at 1196. "Soon after the June 3 primary, some Republican officials began encouraging crossover voting on a statewide basis." *Id.* The Democratic Party kept publicizing its prohibition against crossover voting, and Republicans continued to state that crossover voting was legal. *Id.* Notwithstanding the Democratic Party's position, one Democratic candidate for governor, Charles Graddick, who was then the Attorney General for the State of Alabama, "was widely quoted in the major newspapers throughout the state on June 23, one day prior to the [runoff] election, encouraging voters who had voted in the Republican primary to crossover and vote for him in the June 24 runoff." *Id.* "On this same day when candidate Graddick was calling on those who had voted in the Republican primary to vote for him in the Democratic runoff, as Attorney General he had copies of a letter hand delivered to the state's election officials advising them that the Democratic Party's anti-crossover rule was

unconstitutional. These letters were written on state Attorney General's letterhead and were signed with Mr. Graddick's approval by Susan McKinney, chief of the voter fraud division of the Attorney General's office. These letters had the appearance of an official Attorney General's Opinion Letter warning election officials that any attempt to enforce the Party's rule against crossover voting could subject such officials 'to civil liability under state and federal law.'" *Id.* at 1196–97. In addition, on the eve of the runoff election and at the request of Graddick's campaign officials, a state judge issued an order "admonishing 'election officials and poll watchers that in the event they impair, impede or otherwise attempt to impair or impede the exercise of the right to vote ... in reliance upon the Rules and Directives of the Alabama Democratic Party, they do so at their peril and cannot escape personal liability for such conduct in the event [the] court later determines that said Rules and Directives of the Alabama Democratic Committee are invalid.'" *Id.* at 1197.

On June 24, 1986, the runoff election was held and Graddick was declared the Democratic gubernatorial nominee. Certain black citizens of Alabama who voted in both the Democratic primary and the Democratic runoff elections then commenced a federal class action against Graddick and others, *Henderson v. Graddick*, contending that Graddick altered the conduct of the June 24 runoff election in violation of the Voting Rights Act by misusing the powers of his office to advise Alabama voters that they could vote in the Democratic runoff election in violation of Democratic Party rules, and by threatening election officials with civil and criminal penalties if they attempted to enforce the anti-crossover rule. *Id.* at 1194. The district court agreed with plaintiffs that the Democratic Party rule against crossover voting was constitutional, and that the crossover voting that had taken place in the Democratic runoff election was illegal. *Id.* at 1198–1203.

The plaintiffs in *Henderson v. Graddick* were able to establish that some 33,000 persons voted in the Republican primary; approximately 78% of the Republican primary voters were checked to determine whether they also voted in the June 24 Democratic primary. *Id.* at 1197. It was verified that more than 13,000 voters in the June 24 runoff election had "crossed over." In other words, in *Henderson v. Graddick* (unlike in the instant case), the specific identities of the majority of persons who "crossed over" were known, identified to the court, and considered as part of the record. There was no way of knowing how those crossover voters voted, however, and so for the purpose of determining ***how*** they voted (not ***who*** or ***how many***), the court heard testimony from expert witnesses who conducted voter polls prior to the June 24 runoff election. Based upon the expert opinion evidence, the district court found that "the net crossover votes cast for Mr. Graddick exceeded his narrow margin, and that he would not have been nominated except for the illegal crossover votes." *Id.* at 1198. The court went on to note that Graddick himself, at his victory celebration, had recognized that the Republican crossover vote had helped him secure a victory in the runoff election. *Id.* at 1198 n.3.

The federal district court went on to consider "what permissible remedy is appropriate to cure that wrong." *Id.* Graddick argued that the court should not invalidate the runoff election results because "it cannot be determined with certainty from the available data who would have won the Democratic runoff if no crossover votes had been cast...." *Id.* at 1203. Relying in part upon *Griffin*, the district court found that the effect of the illegal votes does not have to be determined with mathematical certainty in order "*to justify ordering a new election*." *Id.* at 1204 (emphasis added). The district court found that the runoff election was "so close, the number of illegal crossover voters so great, and Mr. Graddick's violation

so flagrant," that no chance should be taken that Graddick received the Democratic nomination as a result of his illegal actions. *Id.*

Importantly, the plaintiffs in *Henderson v. Graddick* -- like the plaintiffs in the case *sub judice* -- urged the federal district court "to purge the crossover votes, [which] according to plaintiffs' evidence ... would result in the election of Mr. Baxley." The district court refused:

> The Court declines to grant this relief. This Court does not sit as a contest committee of the Democratic Party to determine the winner of the election. It sits only to vindicate the requirement of Section 5 [of the Voting Rights Act] that no change may be effected governing the rules for the conduct of elections unless such change is precleared pursuant to the commands of Section 5. We agree with the [district] court in *Griffin v. Burns*, 431 F. Supp. 1361 (D.R.I. 1977) *aff'd*, 570 F.2d 1065 (1978):
>
> > "The electoral process ... must work fairly, and must be seen to have worked fairly -- and worked by the people. There must not be any lurking suspicion that a court, and not the people, has somehow chosen a party nominee." (ellipsis supplied by *Henderson v. Graddick* court).

The remedy that this Court fashions for Mr. Graddick's violation of the Voting Rights Act is to instruct the Democratic Executive Committee

> not to certify Mr. Graddick as the Democratic gubernatorial nominee based on the June 24 runoff election. The Democratic Party is directed to order a new runoff election between Mr. Graddick and Mr. Baxley as soon as is reasonably practical *unless the Democratic Party determines pursuant to its procedures and the stringent rules for a party contest under applicable Alabama law that Mr. Baxley is the legally elected nominee of the party based on its determination of which votes should be purged and for whom such votes were cast.*

Henderson v. Graddick, 641 F. Supp. at 1204 (emphasis added). The district court thus refused to invalidate the illegal crossover votes, the majority of which votes were identifiable by voter (unlike in the case *sub judice*). Instead, the court directed the matter to the appropriate *state* authority, the Alabama Democratic Party.

A subcommittee of the Alabama Democratic Executive Committee thus heard the contest petition of the defeated candidate, Baxley. Under state law, a new primary election could be ordered "only if it is *impossible* for the committee to determine the legal nominee." *Curry v. Baker*, 802 F.2d 1302, 1307 (11th Cir. 1986) (emphasis in original). "Discovery was had, hearings were held by the subcommittee, and evidence was received." *Id*. "The contest sub-committee had before it votes, legal and illegal, in the numbers of 470,051 for Mr. Graddick and 461,295 for Mr. Baxley. It received evidence concerning the activities of Mr. Graddick in soliciting and encouraging crossover votes and in issuing directives as Attorney General of Alabama to voting officials requiring that they allow crossover votes. It had before it the findings, conclusions and judgment of the three-judge district court in *Henderson*...." *Curry*, 802 F.2d at 1307.

The Democratic Party found that Graddick was guilty of election fraud and that Baxley (the defeated candidate in the runoff election) was the legally elected nominee. *Id.* at 1305. Thus, the Democratic Party certified Baxley as the Democratic nominee. Graddick and two of his supporters, J. Frank Curry and Daniel R. Farnell, Sr., filed actions in the United States District Court for the Northern District of Alabama (which were consolidated as *Curry v. Baker*) to challenge the Democratic Party's decision to declare Baxley its nominee for the governor's race. *Id.* Importantly, the issue in *Curry* was not whether the election fraud constituted a constitutional violation; that issue had been decided in *Henderson*, wherein the primary election was set aside and the question of further remedy was referred to the state political party. The issue in *Curry* was whether the Alabama Democratic Party violated Graddick's federal constitutional rights when it certified Baxley. *Curry*, 802 F.2d at 1305. *See also Curry v. Baker*, 479 U.S. 1301, 1302 (1986) ("The issue, generally stated, is whether the actions of the State Democratic Executive Committee exceeded the bounds of due process."). The federal district court found that there had been a due process violation and ordered a new primary election. *Curry*, 802 F.2d at 1305. The United States Court of Appeals for the Eleventh Circuit reversed.

The Eleventh Circuit confirmed that Graddick had orchestrated the casting of thousands of illegal votes: "The precise number cannot be ascertained. The record demonstrates *with certainty* that 10,406 illegal ballots were identified. The record shows with reasonable reliability that 14,168 illegal votes were cast." *Id.* at 1312 (emphasis added). Importantly, and unlike the case *sub judice*, there were identities attached to 10,406 illegal votes. *Id.* at 1308. The Eleventh Circuit next found that the subcommittee did not err, given the applicable state law, in determining through expert testimony *how* the

specific number of illegal crossover voters would have voted. *Id.* at 1313. The Eleventh Circuit then concluded as follows:

> Plaintiffs' claims are, in truth, "the ordinary dispute over the counting and marking of ballots" (citation omitted). In fact they are an even narrower dispute about evidence admissible in a contest over ballots. Settling a dispute brought about by illegal ballots was the task in which the State Democratic Executive Committee engaged. Plaintiffs alleged that the party's subcommittee used the wrong data and reached the wrong conclusion. That does not change the nature of the dispute. Such a dispute does not rise to the level of a constitutional deprivation.

Curry, 802 F.2d at 1316. Having so concluded, the remainder of the *Curry* opinion is *dicta*.

Curry teaches that when a state political party is under a duty to attempt to ascertain the winner of a primary election, and is confronted with evidence of a specific number of illegal votes cast in that election, identified by each voter, it may rely upon expert opinion evidence to determine how those illegal votes were cast. In other words, under such circumstances, the state political party may declare the party's nominee without being mathematically certain that he or she would have won the primary election in which he or she was the apparent loser but for the wrongdoing. *Curry* has nothing to do with a federal court declaring the apparent loser the new winner of a political party's primary election. In fact, the federal court that first heard the dispute, *Henderson v. Graddick*, flatly refused to provide such a remedy and sent it back to the appropriate state authority (*i.e.*, the Democratic Party) with instructions to order a new primary election unless that authority determined

through its own processes that the defeated candidate had in fact won the primary election. *Curry* certainly has nothing to do with a federal court seating a defeated candidate for state office in that office as a representative of the people.

Curry, like *Griffin* (and unlike the case *sub judice*), involved the invalidating of a *primary* election. The salient difference between a federal court invalidating a political party's primary election and a federal court invalidating a state's general (or, as in the case *sub judice*, special) election should not escape this Court's attention. When asked to invalidate *general* elections, the federal courts, absent circumstances far more exceptional than those present here, have declined to do so. *See, e.g., Navedo v. Acevedo*, 752 F. Supp. 523 (D.P.R. 1990), *aff'd*, 932 F.2d 94 (1st Cir. 1991); *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985); *Saxon v. Fielding*, 614 F.2d 78 (5th Cir. 1980); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975); *Pettengill v. Putnam County R-1 School District*, 472 F.2d 121 (8th Cir. 1973); *Devine v. Rhode Island*, 827 F. Supp. 852 (D.R.I. 1993).[6] In fact, in some of these cases, with facts strikingly similar to those *sub judice*, the courts held that

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[6]The exceptional circumstances warranting the invalidation of general elections have included: (i) "racial discrimination which was gross, state-imposed and forcibly state-compelled" in the form of racially segregated voting lists and polling booths, as well as intimidation tactics to keep minorities at the polls from voting, *Bell v. Southwell*, 376 F.2d 659, 659-61 (5th Cir. 1967); (ii) racial discrimination in the form of onerous registration requirements, including payment of a poll tax for two years prior to attaining eligibility to vote, *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966); and (iii) racial discrimination in the form of allowing white voters numerous opportunities to vote by absentee ballot without extending the same opportunities to black voters, *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968). Importantly, in each of these cases the offending election was set aside and a new election called. Even in these exceptional cases, the loser of the election was never declared the winner thereof.

federal jurisdiction was lacking; in other words, the federal court refused even to entertain the disputes -- much less to interfere with state elections by unilaterally deciding that the loser should be made the winner thereof. *E.g., Welch*; *Pettengill*; *Hennings*.

In the instant case, the federal court not only invalidated the state senatorial election; it unilaterally decided the election by seating the defeated candidate as the people's representative. It did so without mathematical certainty that the defeated candidate would have won the election but for the wrongdoing; it did so without setting forth the identity of even one illegal absentee voter.[7]

The dangers of allowing a federal court to seat a defeated candidate for state office without the knowledge and certainty that the defeated candidate garnered at least a plurality of the legally cast votes are obvious and not capable

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[7]The district court made findings that there were "hundreds" of, and in any event more that 462, illegal absentee votes cast for Stinson. This finding is not only unsupported by the record evidence, it is insufficient as a matter of law to establish that Marks would have won the election but for those illegal votes. The finding is unsupported by the evidence because not one illegal voter was identified by plaintiffs or the district court and thus no one really knows how even one illegal vote was cast (much less how 462 illegal votes were cast). The finding is insufficient as a matter of law to establish Marks as the winner because the district court found that there were some illegal votes cast for Marks. B44, ¶ 154. For every illegal vote cast for Marks, another offsetting vote needs to be added to the 462 number. As Petitioners' expert witness testified at trial, because no one knows how each of the absentee voters voted, in order for there to be mathematical certainty that Marks would have won the election but for the wrongdoing, the district court would have had to find that 1,194 illegal absentee votes were cast. The 1,194 figure is arrived at by taking the total number of absentee ballots, 1,757, subtracting the 564 machine advantage attributed to Marks, and adding 1 to break the tie. The district court here made no such finding.

of overstatement. Allowing courts to pick the winners of elections, without certainty that they really won, destroys our representative form of government and makes a mockery of our democracy, which, by definition, vests supreme power in the people that is exercised by them through representatives chosen in free elections. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY.

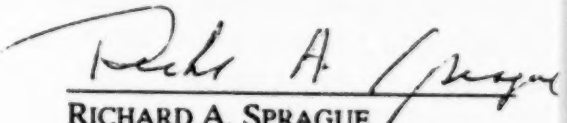
For all of the reasons stated above, Petitioners respectfully submit that before a federal court can take the staggering step of certifying as a state senator the apparent loser in the state election for that senate seat, mathematical certainty that the loser would have won the election but for the wrongdoing *is* required. Mathematical certainty may not be required to invalidate a primary election. Mathematical certainty may not be required to order a new primary election. Mathematical certainty may not be required for a state political party to declare as its nominee the apparent loser in its prior primary election. However, when a federal court decides to invalidate a state senatorial election and then to make the defeated candidate an elected state senator, then the court must be mathematically certain that the defeated candidate would have won the election but for the wrongdoing.

CONCLUSION

Even assuming *arguendo* that this record is sufficient to state a constitutional violation justifying the "drastic, if not staggering" act of invalidating the November 3, 1993 Special Election for Pennsylvania's Second Senatorial District, nothing on this record can justify the seating of the defeated candidate as a representative of the people of that district. Accordingly, Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Third

Circuit to review its Judgment and Opinion entered August 18, 1994.

Respectfully submitted,



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Dated: November 4, 1994
Philadelphia, Pennsylvania

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 94-1474, 94-1475,
94-1476, 94-1481, AND 94-1482

BRUCE MARKS; KATHY STECK,
ON BEHALF OF THE VOTERS OF THE SECOND DISTRICT;
EMANUEL LORENZO; LYDIA COLON; LILLIAN CRUZ;
DIANA IRIZARRY; RUTH MARTINEZ; ZORAIDA RODRIGUEZ; YESENIA VASQUEZ;
REPUBLICAN STATE COMMITTEE

v.

WILLIAM STINSON;
THE WILLIAM STINSON CAMPAIGN;
PHILADELPHIA COUNTY BOARD OF ELECTIONS;
MARGARET M. TARTAGLIONE; JOHN F. KANE;
ALEXANDER Z. TALMADGE, JR.
AND VARIOUS DOE AND ROE DEFENDANTS

MATTHEW GOGOJEWICZ; MARK LOPEZ;
MARY COYLE; MARY MCCAULEY; GREG HAMPSON;
DON BROPHY; PATRICIA HUGHES;
JOHN P. ROONEY; GERALDINE PENN;
DANIEL J. HANEY, IV; JOSEPH LARRY GEEK;
ROSEMARY FARNON; MEYER EIKOV; AL SAVRAN;
FELIX SALDUTTI; ANTHONY IANARELLI; OLGA
SLATYLAK; IDA DOUGHERTY; DANIEL J. SEARS;
JOSEPHINE MARTIN; MARY MARTIN;
JOSEPH J. JORDAN; ANNE JORDAN;
MARY ANN SULLIVAN; MARY MENDOLOSKI;
ANNA HAGAN; ROBERT W. LES,

Defendants-Intervenors

COMMISSIONER ALEXANDER Z. TALMADGE, JR.,
Appellant No.94–1474

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN, MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN, MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN AND ROBERT W. LES,
Appellants No. 94–1475

WILLIAM STINSON,
Appellant No. 94–1476

MARGARET TARTAGLIONE,
Appellant No. 94–1481

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* * *

PHILADELPHIA COUNTY BOARD OF ELECTIONS, MARGARET M. TARTAGLIONE, JOHN F. KANE AND ALEXANDER TALMADGE, JR.,
Appellants No. 94–1482

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 93–6157)
DISTRICT JUDGE: HONORABLE CLARENCE C. NEWCOMER

ARGUED AUGUST 8, 1994

BEFORE: STAPLETON, GREENBERG, and COWDEN,
Circuit Judges
(FILED: AUGUST 18, 1994)

MEMORANDUM OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

This is an appeal in a civil rights action arising from the conduct of an election. Defendants-appellants, William Stinson, the Philadelphia County Board of Elections (the "board"), the three members of the Board of Elections, Margaret M. Tartaglione, John F. Kane, and Alexander Z. Talmadge, Jr., and the intervenors, Ida Dougherty, Daniel J. Sears, Josephine Martin Sears, Mary Martin, Joseph J. Jordan, Anne Jordan, Mary Sullivan, Mary Mendoloski, Anna Hagan, and Robert W. Les, all appeal from a final injunctive order entered in the district court on April 26, 1994. Stinson was the Democratic candidate to fill a vacancy in the Pennsylvania State Senate in the Second Senatorial District and was certified as the winner of the election by the board. The plaintiffs-appellees are Bruce Marks, the Republican candidate to fill the vacancy, and certain voters in the

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* * *

district. We set forth the background of this matter in our opinion on the appeal of a preliminary injunction previously entered in this case, *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), and thus we write today on the assumption that readers are familiar with that opinion.

In our earlier opinion, we affirmed the order for the preliminary injunction to the extent that it enjoined Stinson from exercising the office of Pennsylvania state senator representing the district, but we vacated the injunction insofar as it provided that the board certify Marks as the winner of the election so that he could fill the unexpired term of the office. We remanded the matter for further proceedings which

contemplated that the district court would determine whether "Marks would have won the election but for the wrongdoing." *Id.* at 887. Thus, while we required that the district court not direct Marks' certification unless it could find with confidence that he would have won the election, we did not insist that the district court ascertain his margin of victory as a prerequisite to his certification.

On the remand, the district court conducted a final hearing on the injunction application. Following the hearing, the district court rendered a comprehensive written opinion in which it determined that the evidence demonstrated that the officials responsible for the special election had conspired with Stinson and the Stinson campaign to cause numerous illegally obtained absentee ballots to be cast. The court further found

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that Tartaglione and Talmadge, though election officials charged with the duty to uphold the election law, permitted this illegal voting.[1]

In particular, the district court determined that the board distributed absentee ballot packages in bulk to the Stinson campaign and then accepted the completed ballots when delivered by the Stinson campaign. These practices violate Pa. Stat. Ann. tit. 25, §§ 3146.5 and 3146.6 (1994), as those sections require personal delivery to and from the voter of both the absentee ballot package and the completed ballot itself inside a sealed envelope. Alternatively, the board and the voter may use the mail for these purposes. The sections clearly

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[1]Tartaglione and Talmadge are the Democratic members of the board. Kane, the Republican member, was not involved in the wrongdoing.

are of critical importance because the practice of allowing a third party to handle a ballot makes it possible for that party to influence the voter and thus to frustrate section 3146.6 which requires that the voter vote "in secret." The board aggravated the situation by failing in some cases to notify unregistered voters who applied for absentee ballots that they were not eligible to vote. The board was required by Pa. Stat. Ann. tit. 25, § 3146.2b(d) (1994), to give this notification which would alert an unregistered voter who had attempted to vote to the need to register to vote in future elections.

The district court at the trial on the remand concluded that the defendants engaged in the illegal conspiracy for the

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specific purpose of ensuring that Stinson would win the election, and the court found that the conspiracy was successful. The court based this conclusion on both lay testimony and the testimony of three expert witnesses, and the court found that Marks would have won the election but for the conspiracy. The court also found that the conspiracy was aimed particularly at African-American and Latino voters.

On the basis of its findings, the district court concluded that there had been three constitutional violations actionable under section 1983, namely violation of the plaintiffs' First Amendment right of association and their Fourteenth Amendment rights to equal protection of the law and substantive due process of the law. In addition, the court found Voting Rights Act violations under 42 U.S.C. §§ 1971(a)(2)(A) and 1973(a).

The district court then entered the order on April 26, 1994, from which the appellants have appealed. In particular that order contained the following provisions: (1) Stinson's

certification as the plurality winner of the election was declared void, and he was enjoined from acting as a senator – representing the district; (2) the court required the board in future elections to distribute absentee ballots, applications, and materials in Spanish and English in the Second Senatorial District; (3) the board was enjoined from discriminating and was required to comply with the election laws; (4) the board was ordered to certify that Marks received a plurality of the votes;

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* * *

and (5) the board was required in the Second Senatorial District to provide a space on the absentee ballot application for a voter who anticipated being absent from the county on election day to explain the reason for the absence. After entry of the April 26, 1994 order, the appellants promptly appealed.

We regard the principal issue on this appeal to be whether the district court correctly concluded that Marks would have won the election but for the wrongdoing which the district court identified.[2] In the earlier appeal, we concluded

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[2]At oral argument we suggested that in view of the fact that the Pennsylvania State Senate by resolution dated April 28, 1994, declared Marks to have been the winner of the election and ordered him seated, this case might be moot to the extent that the appellants have appealed from the portion of the injunction ordering the board to certify that he received a plurality of the votes. We raised that point because we were uncertain whether a reversal of the order for the board to certify him would lead to the termination of his Senate tenure. We have, however, determined to consider on the merits the issue of whether the board should have been directed to certify that Marks received a plurality of the votes because it is possible that a reversal by this court might lead the Senate to reverse its position. Thus, we cannot say that a reversal would not give the appellants

(continued...)

that the "evidence and the factual findings of the district court clearly support its conclusion regarding the existence of irreparable injury and the likelihood of success on plaintiffs' Civil Rights Act claims; *i.e.*, that the defendants operating under color of state law violated plaintiffs' rights under the First and Fourteenth Amendments." *Marks v. Stinson*, 19 F.3d at 879. Thus, it is clear in the light of the foregoing legal conclusion that

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if we uphold the district court's findings of fact with respect to the character and scope of the defendants' wrongdoing, the plaintiffs will have established violations of section 1983. Based on our review of the matter, we have concluded that the findings of historical facts made by the district court, with one exception which we shall discuss, are not clearly erroneous. *See Fabulous Assocs., Inc. v. Pennsylvania Public Util. Comm'n*, 896 F.2d 780, 783 (3d Cir. 1990). Furthermore, after independently assessing the inferences to be drawn from the historical facts, we are satisfied with the soundness of the district court's conclusions that the defendants violated section 1983, and that but for these violations Marks would have won the election.

While we do not doubt that there have been earlier violations of the Pennsylvania election laws with respect to absentee ballots, the large scale wrongdoing in the election here makes this case different. We are aware that the federal

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[2](...continued)
effective relief and we therefore will not hold that the appeal from the order for the board to certify that Marks received a plurality is moot. *See In re Swedeland Development Group, Inc.*, 16 F.3d 552, 560 (3d Cir. 1994) (in banc).

courts should not treat "garden variety" election disputes as constitutional violations subject to redress under section 1983. *See Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985). Indeed, it would be possible to construct an analytical model treating any misconduct by a public election official as being subject to an action under section 1983. But this case is not about a "garden variety" election dispute, as the record makes it clear that the election was stolen from Marks and that the board made this possible by disregarding Pennsylvania law.

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While the appellants question whether the federal courts should have had a role in this case, there is nothing unique here regarding the exercise of federal jurisdiction. Indeed, the distinction between "garden variety" election disputes and cases involving large scale unlawful conduct parallels distinctions drawn in other situations in which plaintiffs bring constitutional tort actions under section 1983. For example, we recently made it clear that section 1983 should not be used in minor public employment disputes to trivialize the Fourteenth Amendment. *See Ferraro v. City of Long Branch*, 23 F.3d 803, 806-07 (3d Cir. 1994). Yet there can be no doubt that sometimes public employer actions adverse to an employee can give rise to a case under section 1983. Similarly, while we do not permit section 1983 to be used as a vehicle to convert every land use regulation dispute into a constitutional tort action, sometimes governmental land use decisions are actionable under section 1983. *See Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1668 (1992). In harmony with the approach not to turn every situation involving a violation of state law by a state or local official into a federal civil rights case, we recognize that the district courts are not to be converted into state election courts. Nevertheless, in election cases involving

circumstances as aggravated as those in this one, when public officials are implicated in the wrongdoing it is appropriate for

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a federal court to entertain a civil rights action brought by the injured parties under section 1983.

In reaching our result we recognize that the district court made one mistake of fact in that it found that approximately 600 unregistered voters, and in any event in excess of 462 unregistered voters, voted for Stinson by absentee ballot. In fact, insofar as we are aware all the persons who voted were registered. Of course, the 462 number is significant because that was Stinson's margin of victory when all the absentee ballots were counted. The mistake, however, does not undermine the district court's result because it is clear from the court's other findings that if the illegal votes of *registered* voters are disregarded, Marks would have won the election. Within the context of this case, we do not regard an absentee ballot cast in violation of sections 3146.5 and 3146.6 as being any more legitimate than a vote by a nonregistered voter. The only distinction between the two in this case is that a registered voter improperly voting by absentee ballot might have voted lawfully at the polls. But that distinction does not undermine the district court's conclusion that except for the wrongdoing Marks would have won the election. There was, after all, expert testimony taking into account the hypothetical recapture vote of the registered voters who voted by absentee ballot but otherwise would have voted at the polls. That testimony was that even considering the recapture vote, if there had not been illegal practices Marks would have won.

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The appellants also have raised certain procedural objections. Most significantly, they contend that the district court should have recused itself and that the procedure by which the court appointed Dr. Orley Ashenfelter was irregular. We have examined these contentions as well as the other procedural contentions the appellants advance and find them to be without merit.

We mention one final point. As we have indicated, the district court based its opinion on both section 1983 and the Voting Rights Act, 42 U.S.C. §§ 1971(a)(2)(A) and 1973(a). We, however, do not reach the Voting Rights Act issues, as section 1983 provides an adequate basis for the injunctive relief the court awarded. At oral argument we asked counsel for the plaintiffs to indicate why we should decide the Voting Rights Act issues if we determined to uphold the injunction under section 1983. The only reason given was that Marks might not be able to establish that his expectation of public office was a property interest entitled to protection in a damages action under section 1983. Thus, Marks thought that the Voting Rights Act issues were important as in his view he could recover damages under that Act.

We express no opinion on these legal contentions, as we have no need to do so. We are not concerned now with damages, since the district court fixed damages at a trial held after the appeal was taken in this matter. Accordingly, while some day we

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may have to decide the Voting Right Act issues, that day has not arrived yet.

For the foregoing reasons, we will affirm the order of April 26, 1994.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/ Morton I. Greenberg
Circuit Judge

DATED: August 18, 1994

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 93-6157

BRUCE S. MARKS, et al.

v.

WILLIAM STINSON, et al.

Newcomer, J. April 26, 1994.

After a hearing on a motion for preliminary injunctive relief on February 7 through 9, 1994, and after a two week final hearing in this matter on March 28 through April 8, 1994, and after considering the evidence, the briefs and arguments of counsel, and the statutory and common law of the Commonwealth of Pennsylvania, the court makes the following Findings of Fact and Conclusions of Law. They represent the combined final findings from both the initial and final hearings.

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I. FINDINGS OF FACT

INTRODUCTION

1. Plaintiffs are Bruce S. Marks, Kathy Steck, Emanuel Lorenzo, Lydia Colon, Lillian Cruz, Diana Irizarry, Ruth Martinez, Zoraida Rodriguez, Yesenia Vasquez, and the Republican State Committee.

2. Defendants are William Stinson, the William Stinson Campaign, the Philadelphia County Board of Elections (Margaret M. Tartaglione, John F. Kane, Alexander Z. Talmadge, Jr.), and various Doe and Roe defendants.

3. In addition to the parties previously named in this action, the court granted a motion to intervene from Ida Dougherty, Daniel J. Sears, Josephine Martin Sears, Mary

Martin, Joseph J. Jordan, Anne Jordan, Mary Sullivan, Mary Mendoloski, Anna Hagan and Robert Les ("intervenors"). The intervenors each allegedly cast a legal absentee ballot in the November 2, 1993, Second Senatorial District. Three of the intervenors testified at trial: Robert W. Les, Mary Martin, and Josephine Martin Sears.

4. Republican Bruce Marks ("Marks") and Democrat William Stinson ("Stinson") were candidates for the Pennsylvania State Senate in an election conducted on November 2, 1993, in the Second Senatorial District (the "District"). The election was held to fill the remaining portion of a term which expires in December, 1994. The District consists of all or part of the 7th, 18th, 19th, 20th, 23rd, 33rd, 37th, 42nd, 43rd, 49th, 53rd, 54th, 55th, 56th, 61st, and 62nd wards. *See* Plaintiffs' Exhibit 48.

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This election was particularly significant to both parties because, at the time of the election, control of the State Senate hung in the balance.

5. A significant portion of the District consists of African-American and Latino voters. Testimony of Voters.

6. According to the certified results of the Philadelphia City Commissioners ("the Board"), sitting as the County Board of Elections, candidate Marks received 19,691 votes and candidate Stinson received 19,127 votes on the voting machines on Election Day, for a difference of 564 additional votes for Marks. *See* Official Certification, Plaintiffs' Exhibit 113 and P-88.

7. According to the certified results of the Board, Marks received 371 votes and Stinson received 1,396 votes from absentee ballots. *See* Official Certification, Plaintiffs' Exhibit 113 and P-88.

8. William Stinson was certified as the winner of the 1993 Special Election for the Second Senatorial District by a plurality of 461 votes. *See* Official Certification, Plaintiffs' Exhibit 113 and P-88.

CASTING ABSENTEE BALLOTS

9. Pennsylvania permits a qualified elector to vote by absentee ballot in the event that the elector is, *inter alia*, absent from the Commonwealth or county of residence "because his duties, occupation or business require him to be elsewhere during

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the entire period the polls are open" or is physically unable to go to the polls. 25 P.S. § 3146.1(j) & (k).

10. An elector seeking to vote by absentee ballot must submit a proper absentee ballot application, including a statement that the elector expects to be out of the county on Election Day or that the elector is physically unable to go to the polls, with a declaration stating the nature of the disability and the name, address, and telephone number of the attending physician. 25 P.S. § 3146.2(e)(1) & (2).

11. The application requires that the elector provide a "post office address to which ballot is to be mailed." 25 P.S. § 3146.2(e)(1) & (2).

12. In Philadelphia County, the application has a mailing label on it for the address, which is removed and affixed to the Absentee Ballot Package when the application is approved. Testimony of Dennis Kelly.

13. Although the law requires the elector to provide the "reason for his absence", the application in use in Philadelphia County inexplicably does not require this provision, increasing the possibility of widespread abuse of absentee ballots. 25 P.S. § 3146.2(e)(1); Plaintiffs' Exhibit 1.

14. In Philadelphia, the application is not available in a Spanish translation even though approximately twenty-five (25) percent of the District is Spanish speaking and absentee ballots and declarations are available in a Spanish translation. Testimony of Commissioner Talmadge; Plaintiffs' Exhibit 1-3. The

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inability of some voters to understand the application was a significant factor in facilitating the abuse that occurred in the Second Senatorial District. Testimony of Voters.

15. Absentee ballot applications are processed by the Board and the Board is charged with overseeing elections. The Board consists of the three County Commissioners, Democrat Chairperson Margaret Tartaglione ("Tartaglione"), Democrat Alexander Talmadge, Jr., Esq. ("Talmadge"), and Republican John Kane ("Kane"). 25 P.S. § 3146.2b. Although the Board is controlled by one party, it has a statutory and constitutional obligation to conduct elections fairly and impartially.

16. The practice and procedure of the Board is to promptly time-stamp each application when it is received. Testimony of Commissioner Talmadge and Dennis Kelly. The Board is required to process absentee ballot applications to determine if they meet the legal requirements and to notify an applicant immediately if an application is rejected. 25 P.S. § 3146.2b.

17. The Board does not check the signatures on absentee ballot applications against the signatures on voter registration (binder) cards to prevent forgeries, even though Commissioner Talmadge asserts that it is official policy to do so. Testimony of Commissioner Talmadge and Dennis Kelly.

18. If the absentee ballot application meets the required criteria and is otherwise complete, the Ward, Division, and Registration number (or Control number) is placed on the application by the Board. The Control number is the same number

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that appears on the voter registration or permanent binder card. Testimony of Dennis Kelly.

19. The Board is required to maintain all applications as public records for two years. 25 P.S. §§ 3146.2(i), 3146.9. The application states, as required by law, that "a voter who receives an absentee ballot . . . and, who, on election day, is capable of voting at the appropriate polling place must void the absentee ballot and vote in the normal manner." 25 P.S. § 3146.2(i); Plaintiffs' Exhibit 1.

20. The deadline for receipt of applications is 5:00 p.m. on the Tuesday before the election, which in the instant case was October 26, 1993. 25 P.S. § 3146.2a.

21. After approving an absentee ballot application, the Board is to mail or deliver the corresponding absentee ballot package to the elector using the mailing label existent on the application. 25 P.S. § 3146.5. The absentee ballot package ("Absentee Ballot Package") consists of an outer envelope in which is enclosed a declaration envelope (the "Declaration" or "Declaration Envelope"), an inner envelope (the "Inner Envelope"), a ballot (the "Ballot"), and instructions. 25 P.S. §3146.6; Plaintiffs' Exhibit 1B. The Ballot also states in English and Spanish: "Warning -- If you are able to vote in person on election day, you MUST go to your polling place, void your absentee ballot and vote there." Absentee Ballot Package, P-3.

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22. Pennsylvania law does not permit the Board to deliver an Absentee Ballot Package to any person other than the applicant elector, 25 P.S. § 3146.5, and, upon receipt, an elector is to mark the Ballot "in secret." 25 P.S. § 3146.6. After marking the Ballot, an elector is to seal it in the Inner Envelope, seal the Inner Envelope in the Declaration Envelope, and execute the declaration on the Declaration Envelope. Testimony of Dennis Kelly and Commissioner Talmadge. The instructions, which are the only published information provided to the public and voters, expressly provide in Spanish and English that the absentee ballot must be voted in secret and mailed or delivered "in person" to the Board. These instructions have been approved by the Board and their counsel and restate the provisions of 25 P.S. §3146.6 of the Election Code to the public and voters. Testimony of Fred

Voigt, Pasquale Visco, Charles Bernard, and Edward Schulgen; Absentee Ballot Package, P-3. Pennsylvania law prohibits any campaigning within ten (10) feet of a polling place and no campaigning within the polling place itself. 25 P.S. §3060; Voigt Testimony.

23. Democrat committee person Jennie Bolno testified that in twenty years, voters in her division received their Absentee Ballot Packages by mail without problem. Bolno Testimony. However, in the event that there are certain persons who physically cannot reach the polls, employees of the Commissioners' Office have delivered and returned absentee

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ballots. Testimony of Bernard and Schulgen. The Election Code also provides for voters who need special assistance.

24. The elector is then to "send by mail" or deliver "in person" the executed Declaration Package to the Board. 25 P.S. § 3146.6. The deadline for receipt of absentee ballots is 5:00 p.m. on the Friday before the Election, which in the instant case was October 29, 1993.

25. Ballots are then collected and distributed to polling places on Election Day. 25 P.S. § 3146.8(a); Testimony of Dennis Kelly.

26. An absentee ballot cast by a voter who is in the county of residence and able to go to the polls on Election Day is void as a matter of law, and an absentee ballot voter has a duty to go to the polls and void the ballot in the event such voter is in the county and able to do so. 25 P.S. § 3146.6b.

27. In the event an elector votes in person on Election Day, the Declaration is to be marked "void" and the absentee ballot is not to be counted. Testimony of Dennis Kelly.

28. At the close of the polls on Election Day, absentee ballots are to be canvassed by opening the Declaration Envelopes, removing, mixing, and then opening the sealed Inner Envelopes, and then counting the ballots. This procedure is conducted to ensure the secrecy of the vote. 25 P.S. § 3146.8.

29. Once the inner envelopes are mixed and opened, it is difficult, if not impossible, to match a ballot with a particular voter. Testimony of Dennis Kelly.

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30. The overall absentee ballot process is designed to provide the same privileges and protections as if the absentee voter were to cast a ballot at the polls. Testimony of Commissioner Talmadge.

31. If campaign and party workers who deliver applications to the Board are also given the corresponding Absentee Ballot Packages to deliver to voters, grave opportunity for misconduct is created. For example, there is little or no safeguard against forged applications and ballots, or, when ballots are not completed in secret, the partisan political worker has control over which ballots are subsequently returned and counted. These abuses as well as other illegal activities took place in the instant action. *See, e.g.*, Testimony of Commissioner Talmadge and Birchett; Voter Testimony.

32. Providing Absentee Ballot Packages to campaign and party workers also creates an opportunity for other abuses, such as campaign workers directing completion of, or even completing the applications and ballots for voters. *See infra* FINDINGS OF FACT. This practice was routinely conducted by Stinson campaign workers. Testimony of Commissioner Talmadge; Ruth Birchett Testimony; Voter Testimony.

33. Democrats have controlled the County Board of Elections at least since 1971. Testimony of Dennis Kelly; Commissioner Talmadge.

34. The Board is under a statutory duty to strictly enforce the Election Code to avoid any partiality in the conduct

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of elections. Commissioner Talmadge, however, was unaware of the existence of certain statutory provisions and admitted that certain other provisions were not followed. Commissioner Talmadge and Dennis Kelly both testified that they knew of and even condoned certain Board activities of the Commission that contradicted clear and unambiguous provisions of the Election Code. Testimony of Commissioner Talmadge; Dennis Kelly. Commissioner Tartaglione also knew of, and even directed certain illegal activities, through the office of Commissioner Talmadge. Such activities were specifically designed to favor the Democratic candidate, William Stinson. Board employees, such as Charles Bernard, Pasquale Visco, and Board employee Edward Schulgen, Esq., confirmed that the Board knowingly violated provisions of the Election Code and followed alleged unwritten procedures in so doing. Bernard Testimony; Schulgen Testimony; Visco Testimony. The alleged unwritten procedures were not known

to Republicans or other interested persons. The alleged unwritten procedures were only known to Democrats during the 1993 Special Election. It was established that the Commissioners' Office had previously accepted very limited numbers of absentee ballots to be coordinated through partisan workers prior to the 1993 election. However, these situations always involved approximately two or three absentee ballots. Testimony of Commissioner Kane; Testimony of Voigt. In contrast, the Commissioners' Office secretly processed hundreds of applications

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and hundreds of absentee ballots through partisan Stinson Campaign workers during the 1993 Special Election.

35. Commissioner Tartaglione also distributed Absentee Ballot Packages in her home to Democrat committee persons, such as Mark Lopez, during weekly 62nd ward meetings prior to the election. Committee persons, including Mark Lopez, also would deliver applications directly to Commissioner Tartaglione's office, Room 130, and then obtain the Absentee Ballot Packages, directly from Tartaglione's office, for delivery to the homes of the voters. When in voters' homes, Lopez would encourage voters to cast votes for Democratic candidates. *See* Tartaglione Deposition; Lopez Testimony.

36. If the Board does not strictly enforce the Election Code, the potential for abuse arises, especially when irregular conduct favors one political party. In the instant action, there was no credible evidence to establish that the improper conduct of the Board was generalized and was not intended to favor any one candidate. The testimony establishes that the malfeasance and nonfeasance of the Board was

purposefully directed at favoring only Stinson, the Democrat candidate. This is particularly important in considering final equitable relief.

37. In the past, the policy and practice of the Board was to follow the Election Code and mail or personally deliver Absentee Ballot Packages only to an applicant voter. There are special circumstances where an applicant voter's spouse or close

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relative could obtain the Absentee Ballot Packages, or in very limited circumstances and in very limited numbers other persons were allowed to handle absentee ballots. There has never been a procedure like that followed in the 1993 Special Election regarding absentee ballots. Testimony of Commissioner Kane, Reba Morella, Peter Medina, Fred Voigt, and others. Fred Voigt is the Executive Director of the Committee of Seventy. Voigt, who has been involved in elections in Philadelphia since 1972, was unaware of any written procedures or any public notice which informed Republican committee persons or others that Absentee Ballot Packages could be obtained for delivery to voters.

38. Commissioner Tartaglione was unaware of any meeting of the Board where it was publicly disclosed that Absentee Ballot Packages were permitted to be delivered to voters by candidates or their supporters and further was unable to identify any of the Democrat ward leaders and committee people listed on the "Democrat Machine Team" exhibit who were aware of this practice. Tartaglione Deposition. When shown Absentee Ballot Packages, Commissioner Tartaglione asserted that it was "illegal" for anyone but the

voter to be in possession of the ballot. See Tartaglione Deposition, page 89, line 7 to page 95, line 2.

39. Commissioner Tartaglione's testimony was inconsistent with the position taken by the Board at trial that Absentee Ballot Packages were routinely and openly provided to Republican and Democrat Committee people.

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40. Commissioner Kane offered uncontradicted testimony that no Republican committee people obtained Absentee Ballot Packages from his office. Kane specifically instructed Bruce Marks that Absentee Ballot Packages were required to be mailed to voters and were not permitted to be delivered by committee people or campaign workers. Kane Testimony; Marks Testimony. Commissioner Kane's secretary, Kathleen Orth, confirmed that Kane's office only mailed Absentee Ballot Packages to voters and did not provide them to Republican Committee persons or campaign workers. Testimony of Orth.

41. The Marks Campaign did not conduct, nor were any Marks Campaign workers aware of any absentee voting procedure such as the Stinson Campaign conducted with the Commissioners' Office. *See, e.g.*, Testimony of Charles Santore, and Bruce Marks.

42. Board employee Visco testified that the absentee ballot procedure was executed pursuant to an opinion of the City Solicitor. This testimony was without merit. The letter which contained the opinion allegedly relied upon by the Board was located only two weeks before trial and was unrelated to the delivery of Absentee Ballot Packages and the return of completed ballots. *See* Testimony of Schulgen.

THE 1993 SPECIAL ELECTION

43. In the 1993 Election, Absentee Ballot Packages were provided in bulk, through the offices of Commissioners

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Tartaglione and Talmadge, to the Stinson Campaign for delivery directly to voters. *See* Stinson Deposition, at p. 180; Testimony of Martz, Birchett, and Commissioner Talmadge. The official minutes of the Commissioners' public meetings on October 20 and 27, 1993, however, reflect that Dennis Kelly, supervisor of elections, stated that Absentee Ballot Packages were being mailed to voters. It was not disclosed at the meeting that thousands of Absentee Ballot Packages were being delivered to Democrat committee persons or Stinson campaign workers during the 1993 election. Plaintiffs' Exhibits 120, 121.

44. Commissioner Kane, the Republican City Commissioner, was not aware that other Commissioners permitted absentee ballots to be delivered to Democrat committee persons or to Stinson campaign workers. *See* Testimony of Commissioner Kane.

45. Reba Morella was an employee of the Board. Her responsibilities included processing absentee ballot applications and ballots during the two weeks prior to the election. She did not observe absentee ballots being delivered to Democrat committee persons or to Stinson campaign workers during normal office hours. Rather, the standard operating procedure during normal office hours was to mail Absentee Ballot Packages only to the voter or to allow the voter's spouse to pick it up personally. Testimony of Reba Morella.

46. Commissioner Talmadge and Dennis Kelly, in violation of the Election Code, were secretly conducting activities relating to the Absentee Ballot Packages.

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Commissioner Tartaglione was aware of, and ratified, these activities and also handled a certain number of absentee ballots. Most employees of the Board were not aware of the irregularities. Testimony of Commissioner Talmadge, Kelly and Morella; Deposition of Commissioner Tartaglione.

47. No witness offered any credible evidence that supported the existence of a public practice allowing Absentee Ballot Packages to be delivered to any campaign or political workers for delivery to voters prior to, or during, the 1993 Election. *See* Testimony of Martz, Birchett, Commissioner Talmadge, Voigt, Marks. There were a very limited number of absentee ballots handled by partisan workers prior to the 1993 Special Election. This usually related to situations involving close relatives and was never part of a plan, scheme, or conspiracy, and was never part of some open policy or practice of the Board.

48. For example, Peter Medina, a Democrat Committee persons who worked in various political divisions over the last forty (40) years, never saw Absentee Ballot Packages in the hands of any campaign worker prior to this election. Testimony of Peter Medina.

49. Stinson worker Josue Santiago approached Medina one or two days before the Election (which would be three days after the deadline for the return of absentee ballots to the Board) with a legal size box full of Absentee Ballot

Packages that he was delivering throughout minority areas of the District.

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Santiago convinced Medina that the law had changed to permit Santiago to have in his possession the Absentee Ballot Packages. Medina had never heard of such a procedure before Santiago communicated it to him. Testimony of Peter Medina. Here is an example of hundreds of absentee ballots being cast after the deadline. As will be discussed, there are other factors to consider. However, when viewing this evidence in conjunction with the evidence to be discussed ***infra***, the effect of the illegally cast absentee ballots becomes abundantly clear.

50. The Board, through the conduct of Commissioners Tartaglione and Talmadge, Dennis Kelly, and their agents, engaged in a covert process specifically designed to assist the Stinson Campaign by delivering, and/or knowingly allowing the delivery of, hundreds of Absentee Ballot Packages directly to the Stinson Campaign and other Stinson supporters, rather than mailing or delivering them to voters. This conspiracy was conducted to favor William Stinson and was coordinated through the Board, Stinson Campaign workers, and ratified by Stinson himself. *See* Testimony of Birchett, Kelly, Jones, and Commissioners Talmadge and Kane.

THE STINSON CAMPAIGN ORGANIZATION

51. The campaign entity organized under Pennsylvania law for the Stinson Campaign was registered as the "Committee to Elect Bill Stinson". Joseph Martz served as

the campaign manager and was paid through Rendell '91, a political action committee

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associated with Democrat Mayor Ed Rendell. Plaintiffs' Exhibit 11; Testimony of Joseph Martz.

52. Frank Felici served as the Treasurer for the Stinson Campaign. Testimony of Martz and Jones.

53. During July, August, and September, 1993, Stinson canvassed predominately Caucasian areas of the district with Craig Cummons, Frank Felici, William Jones, and others. During the canvassing, the canvassers solicited absentee ballot applications from individuals, including persons registering to vote for the first time, pursuant to a plan to obtain twenty (20) absentee ballots from each division. Cummons had worked for Stinson in Stinson's 1991 City Council Campaign and had obtained absentee votes for Stinson. Testimony of Jones; Stinson Deposition, at p. 114; Plaintiffs' Exhibit 113. In October, 1993, Robert O'Brien began overseeing the Stinson Campaign in the non-minority areas. Testimony of O'Brien.

54. O'Brien reviewed the applications obtained by the Stinson Campaign and routinely filled in the dates on those which were not complete. As a result, although registration and absentee ballot applications were obtained simultaneously and registrations were submitted before the October 4th deadline, many absentee applications were dated after being obtained, and in some instances, after the deadline. The alterations to some of the applications are made clear by the

different colored ink on the originals. O'Brien Testimony; *see* original Exhibit Applications P-227.

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55. O'Brien instructed Cummons to deliver approximately 540 completed applications to the Commissioners' Office and obtain the corresponding Absentee Ballot Packages for delivery to the homes of the voters. Cummons Testimony; O'Brien Testimony.

56. Cummons made three trips to deliver the applications in a large box marked "Stinson Campaign". Birchett also delivered completed applications to Tartaglione's office at the direction of O'Brien. Cummons received from the Board's office the corresponding Absentee Ballot Packages in an envelope designated "Stinson Campaign" for delivery by the campaign workers to the homes of the voters. Cummons Testimony; Birchett Testimony; O'Brien Testimony.

57. As a result of the Stinson Campaign's conduct in the non-minority areas, the Stinson Campaign received over 500 Absentee Ballot Packages from the Commissioners' Office for delivery to the homes of the voters. O'Brien Testimony.

58. O'Brien then broke the Absentee Ballot Packages down by ward and division and provided them to Stinson Campaign workers to take into the homes of the voters. The Packages were then returned to O'Brien for delivery to the Board. O'Brien Testimony.

59. Cummons received his instructions from O'Brien and delivered Absentee Ballot Packages to voters and

then delivered the completed absentee ballots to the Stinson Campaign. Cummons Testimony.

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60. Robert O'Brien delivered forty (40) Absentee Ballot Packages obtained by his workers to Democrat committeeman Mark Lopez. Lopez then delivered these Packages into the homes of the voters in Commissioner Tartaglione's 62nd ward. Testimony of O'Brien.

61. Commissioner Tartaglione conducted similar activities in the 62nd ward by distributing Absentee Ballot packages directly to her campaign workers in her own home during weekly ward meetings. O'Brien Testimony; Lopez Testimony; Tartaglione Deposition, at page 60, line 17 to page 64, line 15.

62. Stinson issued instructions to Joseph Martz, his Campaign Manager, and to O'Brien to direct the campaign workers, when delivering the Absentee Ballot Packages into the homes of the voters, to instruct the voter to either check the straight Democratic box, or to check off the individual Democratic names, and then to return the completed absentee ballot to O'Brien. O'Brien kept a tight reign on all absentee ballots and was assured by the workers that his instructions were being carried out. Testimony of O'Brien.

63. As a result of this practice and procedure, and the delivery of absentee ballots into the homes of the voters with the instructions to vote for Stinson, approximately 450 absentee ballots in favor of Stinson were returned to the Stinson Campaign. The ballots were then delivered to the Board by Craig Cummons in two or three deliveries. O'Brien

Testimony; Cummons Testimony; Exhibits P-204 and P-213. Although the Board was

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aware that absentee ballots were being returned by the Stinson Campaign in massive quantities, no voters testified that they relied on representations by the Board in permitting their absentee ballots to be delivered by campaign workers and returned by the Stinson Campaign.

64. Many persons who were hesitant to register because they simply did not want to go to the polls were told that they could fill out an absentee ballot application and obtain an absentee ballot out of convenience. Many applications were received based on this misrepresentation. Testimony of Jones; Testimony of Voters.

65. Many of the applications listed the basis for voting absentee as being out of the county when it was clear in most of the situations that in July, August, or September the voter had no basis to believe he or she would be out of the county on Election Day. Testimony of Jones; Voter Testimony.

66. Candidate Stinson and his campaign workers instructed the canvassers not to fill in the date on the absentee ballot applications in order to conceal that the applications had been solicited many months prior to Election Day. Testimony of Jones. This procedure was also followed late in the campaign to conceal that hundreds of applications and hundreds of absentee ballots were obtained by Stinson workers

after the application and absentee ballot deadlines. *See* Testimony of Cummons and Birchett.

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67. Numerous absentee ballots and applications solicited with Stinson's personal involvement were obtained in violation of the Election Code. Testimony of Jones.

68. The Stinson Campaign also used a strategy whereby workers would tell people they could vote from home, even though many such people were unemployed, for example, and were not going to be out of the county. There was simply no attempt to establish that any of the people were going to be out of the county. The "out of the county" exception was the easiest exception because it was virtually impossible to verify. Testimony of Jones.

69. After working in the field for a few weeks, Jones was assigned to review applications after canvassing each evening and to complete, when appropriate, necessary information for submission to the Board. Jones became concerned that the applications were being obtained in an illegal manner. Testimony of Jones.

70. Jones approached Stinson and complained that improper conduct was taking place in reference to the ballot applications. Stinson advised him to try and have the applications corrected and to return them to solicitors Cummons and Campaign Treasurer Felici for correction. Jones carried out Stinson's instructions, but the same type of problems continued. Testimony of Jones.

71. After he realized that the situation had not been corrected, Jones again approached Stinson and informed Stinson

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that the applications were still being obtained in an improper manner. Stinson directed Jones to use his best judgment and if fifty (50) percent of it looked correct, then he was satisfied. Testimony of Jones. Stinson ratified, facilitated, and conducted procedures to obtain illegal absentee ballots.

72. Stinson told Jones that he was never going to lose another election because of absentee ballots. Stinson then admonished Jones for placing the dates on applications instead of leaving the date blank. Testimony of Jones. This was a standard practice of Stinson Campaign workers.

73. Jones raised questions with Frank Felici and others about the absentee ballots and applications, and Jones was assured that it would not be relevant because Stinson was going to win by such a large margin. Testimony of Jones.

74. After these discussions with Stinson and other campaign workers, Jones became increasingly concerned about the absentee ballot problem and was worried that if he submitted the absentee ballot applications to the Board, he would be the "fall guy" in the event this information became public. In light of this and the continuing illegal activities, Jones resigned. Testimony of Jones.

75. Jones was considered to be a good worker by Stinson, who stated he had no problems with Jones' performance. Stinson Deposition, at p. 101.

76. Stinson stated at his deposition that the applications in the Caucasian areas were submitted directly to

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Commissioner Tartaglione's office and corresponding Absentee Ballot Packages were returned directly to the Stinson Campaign. Stinson Deposition, at p. 101.

ABSENTEE BALLOT PROGRAMS
OF OTHER STINSON SUPPORTERS

77. The Absentee Ballot process was further abused by various committee persons in the District. For example, Fani Papanikalau, a Democrat committeewoman, obtained several illegal absentee ballots in the 42nd ward, 6th division. Adverse inference from Papanikalau Fifth Amendment Testimony.

78. In addition, Absentee Ballots were forged in this division. Testimony of Pedro Figueroa.

79. Barbara Landers, a Democrat committee person, obtained several illegal absentee ballots in the 43rd ward, 19th division. Adverse inference from Landers Fifth Amendment Testimony.

80. Voters were misled into improperly voting by absentee ballots in this division. Testimony of Voters.

81. Anthony Rotondo, a Democrat committee person, Patricia Hughes, Democrat ward leader in the 7th Ward, and Donald Brophy, Democrat Chairman of the 7th Ward obtained several illegal absentee ballots. In addition, Absentee Ballot Packages were provided directly to Democrat

committee persons throughout the District. Testimony of Dennis Kelly. Numerous Democrat workers from the 53rd ward, including ward leader Christine Solomon, and committee persons Anthony Iannarelli and Felix

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Saldutti, also obtained illegal absentee ballots in this ward where Stinson obtained 178 absentee votes.

82. Various voters testified throughout the proceedings. The voters often expressed anger and disillusionment over the entirety of the election process. *See, e.g.*, Testimony of Marjorie Fine, N.T. 4/6/94, at 282.

THE MINORITY ABSENTEE BALLOT PROGRAM

83. Approximately three weeks before the Election, Jones received a phone call from Marge Summers, a worker for the Stinson Campaign. Summers told him that a new internal poll from the Democrat State Committee was published and showed that William Stinson was four (4) percent behind Bruce Marks. Testimony of Jones. This was an initial motive to target specific minority groups. What followed was an intentional and deliberate scheme conducted by the Stinson Campaign and the Commissioners' Office to abridge the right to vote of hundreds of persons based on their race.

84. At that time, Summers disclosed to Jones that the Stinson Campaign was going to saturate the Hispanic areas with applications and that the saturation was going to use the same general scheme that was employed earlier. The "joke" in the Stinson Campaign was that the Hispanics would sign anything. Testimony of Jones. The Stinson Campaign then specifically targeted Latino and African-Americans as groups

to saturate with the illegal absentee ballot program. Testimony of Jones; Testimony of Voters.

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85. In response to the poll, the Stinson Campaign scheme was to convince Latino and African-American voters to cast absentee ballots using, *inter alia*, "Out of County" as the excuse for absentee voting. Testimony of Voters; Jones; and Adverse inference from Ascencio, Landers, Pratt, and Santiago Fifth Amendment Testimony.

86. Ruth Birchett served as the campaign director for the African-American and Latino areas. Testimony of Birchett and Martz. Josue Santiago ("Santiago") was responsible for overseeing the absentee ballot program in the Latino areas. He was hired directly by Stinson, reported to Stinson, and his activities were ratified by Stinson. Testimony of Birchett and Martz.

87. Sultan Mateen ("Mateen") was responsible for overseeing the absentee ballot program in the African-American areas. Angel Ascencio ("Ascencio") was a worker on the Latino Team who solicited absentee ballot applications and ballots. Testimony of Birchett; Adverse Inference, Ascencio Fifth Amendment Testimony.

88. Ramon Pratt ("Pratt") was a Latino Team worker who solicited absentee ballot applications and ballots. Adverse Inference Pratt Fifth Amendment Testimony; Birchett Receipts.

89. Peter Medina, a Democrat Committee person, assisted Santiago as part of the Latino Team. Testimony of Medina.

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90. Several other persons were identified by voters as Stinson supporters who conducted the same absentee ballot procedure. Testimony of Voters.

91. The absentee application and ballot scheme consisted of deceiving Latino and African-American voters into believing that the law had changed and that there was a "new way to vote" from the convenience of one's home. Testimony of Voters; Adverse inference from Fifth Amendment testimony of Santiago, Pratt, and Ascencio.

92. Birchett was instructed to direct Stinson Campaign workers to have voters cast votes for Stinson. Although she claims not to have followed these instructions, the evidence is overwhelming that Stinson workers exerted improper influence over many persons they solicited. Testimony of Birchett; Testimony of Voters.

93. Prior to their contact with Ruth Birchett in her capacity as a Stinson worker, Commissioner Talmadge and Brown were aware that Birchett worked for Stinson, and she had worked on Talmadge's campaign in 1991. Testimony of Commissioner Talmadge.

94. Even though he has a duty to know and understand the Election Code and stated that he was aware of most of the absentee voting requirements, Commissioner Talmadge approved the absentee ballot procedure even though

the procedure involved providing official absentee ballot materials and the ballot

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declarations to campaign workers. Testimony of Commissioner Talmadge.

95. Ruth Birchett even questioned both Candidate Stinson and Commissioner Talmadge as to the propriety of this scheme. She was assured that it was proper. Testimony of Birchett and Commissioner Talmadge.

96. Delivery of Absentee Ballots Packages to the Stinson Campaign workers was not initially disclosed to Commissioner Kane nor was it on the public record of the meetings held by the County Commissioners on October 20 and 27, 1993. Such meetings only disclosed the incorrect information that the Absentee Ballot Package were being returned to the voters by mail. Plaintiffs' Exhibits 120 and 121.

97. The Board's delivery of Absentee Ballot Packages to the Stinson Campaign was designed to aid the Stinson Campaign in obtaining more votes through personal contact with the voter and the Stinson Campaign workers, and was a discriminatory practice which favored one candidate and party over another.

98. Based on this scheme, whereby the Stinson Campaign retained custody of the Absentee Ballot Packages from the Board to the voter and back again, a sampling of over 30 voters testified that in numerous instances Stinson workers executed applications, ballots, and/or declarations without the voter understanding the nature of the document.

In addition, there was significant testimony indicating Stinson workers exerted improper influence over voters in the voters' homes. For example, Stinson

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workers would either instruct the voter to check certain places on the ballot, or in some instances, the workers even filled out the ballots for certain voters and forged other ballots. Testimony of Voters.

99. Voters also completed applications and Declaration Packages after the statutory deadline for receipt by the Board and such ballots were counted by the Board. Testimony of Medina and Voters.

100. Peter Medina obtained Absentee Ballot Packages from voters on November 1, three days after the statutory deadline. Medina acknowledged that, on approaching the voters with their ballots, most of the voters were unaware that they had signed absentee ballot applications. Testimony of Medina.

101. The testimony of the voters is credible, especially given the Board's undisputed failure to properly timestamp official documents such as the Rejected Applications.

102. Some voters testified that they do not want their own illegal votes to count in light of the manner in which their votes were obtained. Some voters testified that they voted as they would have voted had they gone to the polls. Testimony of Voters.

103. The Stinson Campaign and Stinson workers conducted a widespread and deliberate scheme throughout the

Latino and African-American areas to knowingly misrepresent election procedures and illegally obtain absentee votes. This scheme was known to at least Commissioners Talmadge and

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Tartaglione, and to Dennis Kelly, and was known and ratified by Candidate Stinson. Testimony of Jones, Medina, Birchett, Brown, and Commissioners Tartaglione and Talmadge.

THE $1.00 PER BALLOT PROGRAM

104. One part of the scheme involved paying field workers $1.00 per application or ballot obtained. Testimony of Martz and Birchett, and Adverse Inference from Fifth Amendment Testimony of Santiago, Pratt, and Ascencio. Ruth Birchett testified that at least $500 to $700 was dispensed in this effort to obtain such amount of votes. It was established at the final hearing that Birchett paid approximately $600 to Stinson field workers for absentee ballots at the rate of $1.00 per ballot. Testimony of Birchett, N.T. 3/28/94, at 199, 203, 204, 218, 225.

105. The general scheme was also implemented through the use of phone bank scripts in English and Spanish which informed voters that they could elect Bill Stinson by voting from home. Plaintiffs' Exhibit 8. The English translation of the Spanish script could reasonably lead a person to believe that there was a new way to vote. Testimony of Martz and Birchett.

106. After receiving Absentee Ballot Packages from Commissioner Talmadge's office, Birchett distributed said ballots to Stinson Campaign workers, Josue Santiago, Sultan Mateen, Willie Torres, Ramon Pratt, Angel Ascencio, and

others to be taken to the homes of the voters. The Campaign workers were to obtain a Stinson vote from the voter and return the absentee ballots directly to Ruth Birchett. Voters were often told how to

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vote or were improperly influenced into voting for Stinson, and voters were seldom able to cast their ballots in secret. Ruth Birchett also delivered 113 ballot packages to Patricia Hughes' home for her distribution to additional absentee voters within the 7th Ward. Birchett Testimony; Talmadge Testimony; Absentee Ballot Receipts, Exhibit P-10; Martz Testimony; Exhibit P-5.

107. Birchett accounted for all payments for absentee ballots and collected receipts from various campaign workers representing the payments of $1.00 per absentee ballot declaration she received from them after they obtained the ballot from the voters' home. Birchett Testimony; Receipts, Exhibit P-10; Martz Testimony.

108. Birchett testified that she did not start making any payments for applications or ballots until after the contributions targeted for the minority area were received. The first contribution, a $4000 contribution from the Committee for a Democratic Majority PAC, was received on October 25, 1993, and a subsequent contribution was received on October 28, 1993. Birchett Testimony; Exhibit P-11. The timing of these payments is substantial evidence that the receipts, as listed below, corresponded to ballots and not applications, because the deadline for applications had passed.

109. $4,000 was specially allocated to the Stinson Campaign from a political action committee associated with

Democrat State Senator Vincent Fumo. Testimony of Martz and Birchett.

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110. Birchett paid the campaign workers "on the spot" rather than at a later time. One reason for paying workers immediately was that the workers needed the money for staple products. Birchett Testimony.

111. Birchett discussed the $1.00 per absentee ballot scheme with Howard Cain, who in turn helped obtain the funds for the scheme. Birchett Testimony.

112. Certain of the $1.00 per ballot receipts identified by Ruth Birchett as payments in this program are identified as follows from P-10, at page 109:

NO.	DATE	PERSON	AMOUNT
1	10/29/93	Josue Santiago	$169
6	10/30/93	Willie Torres	65
7	10/29/93	Sultan Mateen	49
11	10/27/93& 10/28/93	Ruth Birchett	162
12	10/26/93	Sultan Mateen	170
	10/28/93	Sultan Mateen	109

113. With the exception of Receipt 12, all of the above receipts were dated after October 26, 1993, the last date for submitting applications. Exhibit P-10. The receipts are also significant because of the Commissioners' failure to

properly time-stamp applications and ballots. Normally, applications are received in City Hall, Room 138, and time-stamped. Testimony of Spinosi. However, the failure to follow this standard procedure is further evidence tha t the above listed $1.00-per- ballot ballots were being received and processed after

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the deadlines. Testimony of Commissioner Talmadge, Kelly, Medina, Spinosi. The court also heard evidence, primarily at the initial hearing, establishing that hundreds of absentee ballots were illegally cast in addition to those listed above. However, the receipts listed above represent specific numbers of illegally cast ballots. As will be discussed, the court further finds that the vast majority of these ballots were cast by voters who could not have subsequently gone to the polls or otherwise have cast a legal vote.

114. In considering Birchett's trial testimony, and its inconsistencies with her deposition testimony, the content and description of the receipts in P-10, Exhibit 209 and all the other evidence, the court finds that over 600 absentee ballots were returned to Ruth Birchett by Stinson Campaign workers operating throughout the Second Senatorial District. The Campaign workers delivered Absentee Ballot Packages into the homes of the voters, influenced them to vote for Bill Stinson, and were paid $1.00 per ballot for each ballot returned to Birchett. Birchett then delivered the ballots to Commissioner Talmadge's office and to City Hall, Room 138, where the ballots were thereafter counted on Election Day. Exhibits P-9, P-10, P209; Birchett Testimony; Commissioner Talmadge Testimony; Brown Testimony; Stinson Applications

(P-91); Stinson Rejected Applications (P-90). Martz's testimony corroborated that receipts, such as Receipt 1, were for the $1.00 per ballot payment. Exhibit P-10.

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115. Most, if not all, of the $1.00 per ballot votes were cast for Stinson. This finding is based on the following: a) Stinson Campaign workers solicited said ballots in the homes of voters and often directed, coerced, and/or intimidated voters to vote for Stinson; b) the Campaign workers had a political and financial interest in obtaining votes for Stinson; c) certain voters testified that they cast absentee ballots for Stinson in connection with the late absentee ballot canvassing and that they were often unduly influenced to do so; and d) because the Campaign workers often directed how a voter should cast his or her ballot and because not all ballots were properly sealed in their envelopes or time-stamped by the Commissioners' Office, the worke , had control of which ballots were returned and subsequently counted.

116. Each of the $1.00 per ballot votes were cast after the deadline for absentee balloting. However, a finding that there were over 600 absentee ballots cast for William Stinson after the absentee ballot deadline is not sufficient by itself to ensure the electorate that Bruce Marks would have won a plurality of the vote. In light of the Third Circuit's mandate, this court must also consider whether these absentee voters who were defrauded could have otherwise gone to the polls or cast a legal ballot.

UNREGISTERED VOTERS CASTING ABSENTEE BALLOTS

117. The absentee ballot applications corresponding to the above listed Birchett receipts were processed primarily, if

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not entirely, through Commissioner Talmadge's office. This procedure was known to Commissioner Tartaglione. Testimony of Commissioner Talmadge; Birchett; and Brown.

118. Ruth Birchett called Commissioner Talmadge's office and spoke first to Tonya Brown, Commissioner Talmadge's secretary, and then to Talmadge himself. Brown Testimony.

119. Pursuant to an instruction from Commissioner Tartaglione, Ruth Birchett telephoned Commissioner Talmadge's office and spoke with Tonya Brown. Brown informed Commissioner Talmadge that Birchett was on the telephone and told him that Birchett had been instructed to call.

120. Commissioner Tartaglione was not going to process hundreds of absentee applications and return the corresponding ballots to Birchett. However, Tartaglione instructed Birchett to speak with Commissioner Talmadge, and the processing of hundreds of ballots began in earnest. Brown Testimony.

121. Birchett was not credible when she denied providing this information to Brown in light of the numbers of ballots she handled, the number of trips she made to Commissioner Talmadge's office, and her other contacts with the

Commissioners' Office. Birchett Testimony; Brown Testimony.

122. After speaking with Birchett, Commissioner Talmadge directed Brown to implement a program to process massive numbers of Democrat applications and ballots. This program was specifically designed to favor the Democrat candidate. Commissioner Talmadge permitted his office to favor the Stinson

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Campaign despite the fact that neither he nor Brown had ever conducted such a widespread procedure prior to the Stinson Campaign. Commissioner Talmadge Testimony; Brown Testimony; Birchett Testimony. If individuals were ever permitted to handle absentee ballots for another person, the number of ballots was always very few in number and it was almost always concerning an absentee ballot for a family member. *See, e.g.*, Testimony of Commissioner Kane.

123. Birchett then obtained a case of approximately 1,000 absentee ballot applications from Brown. Birchett Testimony. After the Stinson field workers obtained completed applications, they were given to Birchett for return to Brown.

124. When Birchett made the first delivery of applications, she was introduced to Dennis Kelly in Room 138 where the applications were received for processing. Brown Testimony. During this trip, she also delivered completed applications which she received from Stinson's field director in the non-minority area, Robert O'Brien, who directed her to deliver them to Commissioner Tartaglione's office. Birchett Testimony; Stinson Deposition.

125. Approximately 200 to 300 applications were delivered to Brown in Commissioner Talmadge's office the first time, and Brown was told to have them processed to obtain Absentee Ballots Packages for return to Birchett. Brown Testimony. When Birchett delivered the applications, she

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believed that she would receive back the corresponding Absentee Ballot Packages from Commissioner Talmadge. Birchett Testimony.

126. After the applications were processed, Brown was informed by Charles Bernard, a Board employee, that many applications had been rejected because the applicants were not registered to vote. Although Bernard denied having provided this information to Brown, his denial was not credible in light of the other testimony concerning the numbers of unregistered voters. Brown Testimony; Bernard Testimony.

127. Brown communicated this information to Birchett. Birchett Testimony. Brown was then instructed by Commissioner Talmadge to call Birchett to pick up the Absentee Ballot Packages for delivery to the voters. Brown Testimony. When Birchett picked up the first batch of Absentee Ballot Packages, she dropped off a second batch of applications. Birchett Testimony.

128. Based on the information regarding problems associated with the first batch, Brown picked ten applications at random and checked them to determine whether the applicants were registered voters. Her computer check revealed that all ten applicants were unregistered. Testimony

of Brown. This is significant because the random sample, although not large in number, demonstrates that a large percentage of the applications, and therefore the subsequent ballots, were cast by persons who could not have voted at the polls.

129. Brown informed Commissioner Talmadge of the unregistered voters associated with the first batch of returned

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applications and of her own investigation concerning the second batch of applications to Commissioner Talmadge. Testimony of Brown, N.T. 3/28/94, at 119.

130. Commissioner Talmadge instructed Brown to take the second batch of applications to Room 138 and "stay out of it." Testimony of Brown, N.T. 3/28/94, at 122. After the second batch of applications was processed, Talmadge instructed Brown to call Birchett to pick up the corresponding Absentee Ballot Packages. Brown Testimony.

131. Following a third and fourth delivery of applications from the Stinson Campaign, Commissioner Talmadge again instructed Brown to call Birchett to pick up the corresponding Absentee Ballot Packages. Brown Testimony.

132. In excess of 1,000 applications from the Minority Area were submitted by the Stinson Campaign. Exhibit P-91.

133. Brown estimated that over 500 Absentee Ballot Packages were delivered from Commissioner Talmadge's office to the Stinson Campaign in the four deliveries of which

Brown was aware. Testimony of Brown, N.T. 3/28/94, at 124-25.

134. In sum, approximately 600 (but in any event in excess of 462) unregistered voters cast absentee ballots for William Stinson after the deadline for submitting absentee ballot applications based on the $1.00-per-ballot program alone. Most of these voters could not have subsequently gone to the polls to cast a legal vote for Stinson because the voters were not registered. In addition, there were other illegally cast

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absentee ballots for William Stinson that resulted from the absentee ballot scheme, for example, the forged absentee ballot of Pedro Figueroa. The $1.00-per-ballot receipts are enough to satisfy the court that William Stinson received in excess of 462 illegal votes by persons who could not have otherwise voted legally, and these other illegal votes provide overwhelming support for the finding that there were in excess of 462 illegal votes for William Stinson. There was no evidence that voters relied on representations by the Board in voting by absentee ballot when they were not qualified to do so. Instead, the Board's written instructions on the application and in the Absentee Ballot Package, in Spanish and English, make clear that a voter in the county must go to the polls. There was no evidence to suggest that any voters returned their absentee ballots through committee persons or Stinson Campaign workers based on representations by the Board. Instead, the written instructions of the Board make clear that a voter must either mail or deliver the completed ballot "in person" to the Board.

135. Bruce Marks would have won the 1993 Special Election in the Second Senatorial District but for the wrongdoing as set forth in these Findings.

136. The electorate can be certain that Marks obtained a plurality of the legal votes and that Bruce Marks may properly fill the vacant Senate seat from the Second District.

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THE BOARD'S COVERT PROCESSING OF BALLOTS

137. Approximately 400 applications were rejected by the Board as being "not in binder" and/or "not in system", in other words, unregistered persons (the "Rejected Applications"). Plaintiffs' Exhibit 90. One application was filed by Stinson worker Sultan Mateen. Only sixty of these original applications bore the stamp of the Board's office.

138. Normally, applications are received in Room 138 and time-stamped. Spinosi Testimony. After being time-stamped, the applications are bundled for delivery to the Commissioners' Office at Delaware and Spring Garden Streets for processing. Antoinette Spinosi is the Board employee who was responsible for overseeing the processing of applications, which entailed checking registration records to determine whether applicants were registered to vote. Spinosi Testimony.

139. If an applicant is not listed in the computer system, the application would be marked "NIS" -- "not in system." Applications could also be checked against the actual voter registration binders. If an applicant is not listed

in the binder, the application would be marked "NIB" -- "not in binder." Spinosi Testimony.

140. On any given day between October 11, when processing began, and October 26, the deadline for applications, only a few applications were rejected throughout the entire City of Philadelphia for not being registered to vote. Spinosi Testimony.

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141. Not more than five (5) to ten (10) applications were rejected per day over this sixteen (16) day period, or a total of no more than 160 applications city-wide. Spinosi Testimony. This is significantly less than the close to 400 Rejected Applications returned to Birchett for the Second District alone. Spinosi testified that no such amount of Rejected Applications passed through her office. The Rejected Applications were processed outside the normal course by someone other than Spinosi, even though Spinosi stated that no one else was permitted to process applications and that it would be improper to process them any where except in her office. Dennis Kelly originally testified that he received the Rejected Applications from Delaware and Spring Garden Streets before returning them to Talmadge. Spinosi and Talmadge have both contradicted the testimony of Kelly. Spinosi Testimony; Exhibit P-90; Exhibit Spinosi 1, 2, and 3; and Exhibit P-224; Testimony of Commissioner Talmadge; Testimony of Kelly.

142. Occasionally, Spinosi would get "special" groups of applications to process. This "special treatment" was rare. Otherwise, approved applications are bundled in groups of fifty (50) and returned to Kelly. Spinosi Testimony.

143. Applications submitted by Democrat committee persons and the Stinson Campaign were not sent to Spinosi for processing nor returned to Kelly. Such applications would have been bundled with other applications and it would have been impossible to separate these "special applications" from

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applications processed in the normal course in order for the corresponding Absentee Ballot Packages to be provided to committee persons and the Stinson Campaign. The applications that were received through Commissioner Talmadge's office by Birchett and Brown, Commissioner Tartaglione's office by Birchett, and Dennis Kelly's office by Craig Cummons, directed by Robert O'Brien, were in groups of hundreds of applications for special processing, which Spinosi testified were not processed by her department. Spinosi Testimony; Bernard Testimony; Visco Testimony; Tartaglione Deposition; Birchett Testimony; O'Brien Testimony; Brown Testimony; Cummons Testimony; Talmadge Testimony.

144. Charles Bernard testified that rejected applications received after the date of registration were returned to the voters within two weeks after the Election. Bernard could not explain why original applications that were rejected by the Commission were in the Commission's office and delivered to the Attorney General. Bernard Testimony; Exhibit P225; Original Applications delivered to Attorney General's office by Dennis Kelly and Robert Lee.

145. The rejected Applications were normally retained by the Board (*see, e.g.*, Voigt Testimony) and the massive amount of Rejected Applications which were not returned to the voter (*See* Bernard Testimony), or maintained

as original records of the Commission, as provided by the Election Code (*See* Exhibits P-86,

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87), were returned to the Stinson Campaign as part of an attempt to conceal wrongful conduct.

146. Kelly did not disclose this information to the Pennsylvania Attorney General's office when questioned about the procedures. Testimony of Dennis Kelly.

147. Martz advised Ruth Birchett to discard the Rejected Applications. This is further evidence that the Stinson Campaign knew of the improper absentee ballot activities and later tried to conceal such activities.

148. Commissioner Talmadge knew about the Rejected Applications, facilitated the distribution of hundreds of Rejected Applications to Stinson Campaign workers, intentionally failed to enforce the Election Code, and later attempted to conceal this activity. Testimony of Commissioner Talmadge, Birchett, and Kelly.

149. Despite hundreds of applications being returned to the Board, no one made any effort to investigate this conduct even though one returned application could stimulate such an inquiry. Testimony of Commissioner Talmadge and Kelly. This is further evidence of the larger conspiracy being conducted between Commissioners Tartaglione and Talmadge, other Board employees, and several Stinson Campaign workers.

150. The practice of returning absentee ballot applications to a party or candidate was done outside the normal course of the Board.

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151. Applications submitted by Democrat committee persons and the Stinson Campaign were given special processing separate from the Delaware and Spring Garden program in the Democrat Commissioners' offices and separated by ward and division for return to the committee persons and Stinson Campaign. Spinosi Testimony; Bernard Testimony; Visco Testimony.

152. The rejected Applications were delivered from the Delaware Avenue and Spring Garden Street office, where they were processed, to the custody of Dennis Kelly, who returned them to Commissioner Talmadge, who in turn delivered them to Ruth Birchett. No record of the Rejected Applications was kept. Testimony of Dennis Kelly.

153. No notification was given to the persons who submitted the Rejected Applications that such applications were rejected, nor was notice provided to applicants regarding the reasons why their applications were rejected. In light of the returned applications, Dennis Kelly's inaccurate reports at the Board's meetings, the secret dealings between the Board and Stinson Campaign workers, and other testimony, Commissioners Tartaglione and Talmadge, other Commissioners' Office employees (like Dennis Kelly), and Stinson Campaign workers attempted to conceal the absentee ballot scheme whereby hundreds of applications and ballots were processed outside of the established procedures of the Commission, in

violation of the Election Code, with the purpose of favoring Candidate Stinson.

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Testimony of Kelly, Jones, Brown, Spinosi, and Commissioner Talmadge.

154. The court has considered that there were a few illegally cast votes for Marks, but this number is small compared to the over 462 illegally cast absentee votes for Stinson and this number does not alter the result. The court does not suggest that any illegally cast votes are insignificant or should not be corrected, but as far as the matter presently before the court, the number of illegal votes cast in favor of Candidate Marks were relatively few and are not outcome determinative. Further, and more importantly, there was no evidence to suggest that any of the dozen or so illegal votes for Marks were related to an illegal scheme or plan, or that said votes were knowingly processed by the Board of Elections, or that Marks knew or promoted any such illegal conduct.

155. For example, Joseph Giedemann, a Republican Committee person, picked up and delivered approximately ten ballots, but there was no evidence to suggest that this activity was part of a scheme approved by the Republican candidate, that the procedure was facilitated by the Board of Commissioners, that Mr. Giedemann was associated with the Marks Campaign, or that Mr. Giedemann conspired with any other person to knowingly mislead voters.

156. Charles Bernard, an Election Clerk for the Board of Commissioners, described a procedure whereby

certain persons in the Commissioners' Office provided applications and ballots to

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both Republicans and Democrats and that the Commission generally did not follow proper Election Code procedures in disseminating and accepting absentee ballots. *See, e.g.*, Testimony of Catherine Orth, Kenneth Evans, Pasquale Visco, and Hillel Levinson. This testimony, along with similar testimony from other defense witnesses, does not discredit plaintiffs' claims but simply further illustrates that the Commissioners have not been complying with the Election Code for a substantial period. This evidence did not establish that the Commissioners previously favored one candidate over another, but plaintiffs have demonstrated that Commissioners Talmadge and Tartaglione did conduct illegal activities which favored the Democrat candidate in the 1993 Special Election in the Second Senatorial District in addition to a variety of other violations which have been conducted for many years. It is not a defense for the Commissioners to claim that they should not be liable for specific illegal conduct relating to the 1993 Special Election because the Commissioners have failed to observe certain other election laws for several decades. Such evidence does not diminish plaintiffs' claims that Commissioners Talmadge and Tartaglione favored the Democrat candidate over the Republican candidate, but instead such evidence further demonstrates that the Commission, candidates, and certain public officials have knowingly failed to follow the clear and unambiguous terms of the Election Code.

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157. Hillel Levinson, a defense witness formerly Managing Director of the City of Philadelphia and more recently associated with Intervenors' counsel in the practice of law, testified that it was "fair" for certain candidates or persons to benefit from procedures not authorized by the Election Code if the spirit of any such procedures was to enfranchise voters. The court does not agree.

158. In sum, the Commissioners' Office generally has not followed the Election Code. Specifically with reference to the 1993 Special Election, Commissioners Talmadge and Tartaglione and other members of the Commissioners' Office specifically aided and favored the Democrat candidate. As discussed in the court's prior findings, Commissioners Talmadge and Tartaglione could have prevented much of the illegal activity that occurred even if the Stinson campaign had acted illegally. If the Commissioners would have observed and enforced the Election Code, the Stinson campaign could not have illegally altered the outcome of the election. Not only did the Commission not correct the known illegal activities, the Commission also facilitated the scheme and then attempted to conceal the conspiracy.

159. One overarching observation from the totality of these proceedings is that many voters, political workers, and election officials are not properly informed, or have intentionally refused to be informed, of the rudiments of the Election Code. Defendants put forth evidence of irregularities and even illegalities in the election process that have been

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conducted for many years. Such evidence does not diminish plaintiffs' claims, but instead further establishes the need for City officials, candidates, and the electorate to become aware

of the basics of the election process and the election laws. If certain practices are different than the election laws, the City and the Commonwealth should either change the law or enforce the law, but not merely arbitrarily enforce or ignore certain laws. The court will not condone certain activities simply because they may be traced back to the time of William Penn, especially when such activities are covert, designed to promote the interests of those in power, and are expressly contrary to established law and when certain persons rely and depend on those laws. The electorate cannot be confident of any election results if the Election Code is not followed. The Circuit Court stated that, "Our primary concern . . . [is] to promote the public's interest in having legislative power exercised only by those to whom it has been legally delegated. This interest is not served by arbitrarily ignoring the absentee vote . . . ." *Marks v. Stinson*, Nos. 94-1247 and 94-1248, slip op. at 29-30 (3d Cir., March 16, 1994). It is equally as important that the election laws are not arbitrarily enforced. Such laws are enacted to ensure that election results are worthy of the public's confidence.

THE IMPROPER CERTIFICATION

160. On November 18, 1993, the Board certified Candidate Stinson as the winner of the election from the Second

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Senatorial District. However, this was done during the course of the public hearing prior to issuing their findings of fact and conclusions of law. The decision to certify Stinson was made on November 18, 1993 when all other candidates for Election in the County of Philadelphia were certified on November 22,

1993. Testimony of Commissioner Talmadge; Deposition of Tartaglione.

161. The Board certified Stinson during the hearing even though Commissioner Talmadge knew that the Election Code provided two days to appeal a decision of the Board with respect to challenges and even though he knew Marks was going to appeal. Marks did appeal. 25 P.S. § 3146.8(e) requires the County Board to suspend any action in canvassing, computing, and certifying the winner pending the 48 hour period during which Marks had a right to appeal the City Commissioners' decision and 25 P.S. § 3157 requires the Board to suspend certification pending such appeal.

162. The actions of the Board were designed to, and did in fact, prevent any realistic opportunity to appeal the certification in the State court system. The Board applied the Election Code in a discriminatory manner designed to favor one candidate. Certifying Stinson in this manner would end inquiries into the election abuse in which Commissioners Tartaglione and Talmadge participated. The Board conducted nothing more than mock hearings and intentionally reached decisions that would not reveal their involvement in the ongoing absentee ballot voting conspiracy. Defendants alleged plaintiffs consistently failed to

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avail themselves of the proper appeal procedures. Plaintiffs were never given the opportunity to present their claims because the safeguards failed at every level. Commissioner Talmadge readily admitted that if the Board would have properly performed its function even in light of the conduct of the Stinson Campaign, then the absentee ballot scheme would not have tainted the election in such an invidious manner.

163. The appeal and challenge structure is grounded in the rudimental supposition that the process is fair and not inherently flawed. The Stinson Campaign activities relating to the absentee ballots were illegal. Nonetheless, this abuse should have been corrected by the Board. The improper actions of the Board deprived the plaintiffs from ever having their claims heard. Based on the Board's decision with reference to the challenges, the Board deprived the Court of Common Pleas of jurisdiction to consider plaintiffs' substantive claims. In short, the Board participated in an improper scheme and were then called upon to sit in judgment of that very conduct.

THE EXPERT WITNESSES

164. Three different experts testified at the final hearing: plaintiffs' expert, Dr. Brian Sullivan; intervenors' expert, Dr. Paul Shaman; and court appointed expert, Dr. Orley Ashenfelter.

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DR. BRIAN SULLIVAN

165. Dr. Brian Sullivan testified as an expert in econometrics and survey research. N.T., 3/29/94, at 14; P-211.

166. Dr. Sullivan reviewed a survey of absentee voters in the November, 1993 Special Election that was conducted by workers associated with the Marks' Campaign shortly after the election. Sullivan Testimony, N.T., 3/29/94; P-212. Initially, Dr. Sullivan examined the survey to determine whether the data it produced were sufficiently reliable.

Sullivan Testimony, N.T., 3/29/94, at 15. To determine the reliability of the survey data, Dr. Sullivan reviewed the form of the questionnaires used in the survey and the affidavits of the survey workers. He found that the initial form of the questionnaire lacked a signature line for the voter. He designated the 285 questionnaires of this type as "pretest" and, in accordance with survey research practice, did not analyze them. N.T., 3/29/94, at 25-26. The second form of questionnaire used by the survey contained a signature line for the voter to verify the accuracy of the survey worker's write-up of the interview. N.T., 3/29/94, at 17, 24.

167. Dr. Sullivan also interviewed several survey workers regarding the design of the survey and the actual interviewing process. The instructions given to the survey workers were significant. The workers were urged to be accurate in recording voters' responses. In addition, most surveys do not require their workers to execute affidavits about the veracity of their recording; however, this survey did.

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168. Dr. Sullivan also compared voters' interview sheets with the sworn testimony of the same voters in four separate proceedings that occurred after the survey. These included a voter who testified before the Board, three (3) voters chosen randomly from a witness list by a Judge of the Court of Common Pleas, fourteen (14) voters who testified before another Judge of the Court of Common Pleas, and forty-three (43) voters who testified in the preliminary injunction hearing before this court.

169. Finally, Dr. Sullivan compared survey interview sheets with affidavits of probable cause filed by agents of the

Pennsylvania Attorney General's Office in criminal cases arising from the election. Sullivan Testimony, N.T., 3/29/94, at 15-20. This is significant corroboration of the survey data.

170. Dr. Sullivan found a high correlation between the survey interview sheets of voters and the subsequent testimony of the same voters. Exhibit P-212. The fact that pending legal proceedings allowed voters who were interviewed by the survey to be subsequently examined under oath in court proceedings resulted in an unusually high degree of verification for survey research. N.T., 3/29/94, at 19.

171. Survey interview sheets for 1250 voters were provided to Dr. Sullivan. He eliminated 285 pretest interview sheets, twelve (12) duplicates, and any sheet for a non-absentee voter. Dr. Sullivan also eliminated from his primary analysis 406 survey sheets that were unsigned by an interviewed voter.

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The remaining interview sheets were sufficient in number to constitute a valid sample of the minority and other areas in the District. Sullivan Testimony.

172. Without any verification or other means of corroborating his survey data, Dr. Sullivan's report and opinions would have been much less significant. The integrity of any survey is initially predicated on the reliability of the raw data collected. Dr. Sullivan's raw survey data were compiled by partisan Marks supporters. However, the court finds that the data were reliable in light of the many verifications performed and statistical adjustments made to the data.

173. Based on this court's findings of types of illegal practices in absentee voting in its February 17, 1994, Memorandum Opinion, the survey showed that, out of 127 interviews in the "minority" areas, 116 or 91.34% absentee ballots were illegal. It also showed that, out of 332 interviews in the "other" areas, 270 or 81.3% absentee ballots were illegal. These percentages can be used to project that there were 1,395 total illegal absentee ballots cast in the election, 496 in the minority area and 899 in the other area. Sullivan Testimony.

174. This number of illegal absentee ballots is supported by the record evidence. Approximately 600 illegal absentee ballots were obtained through the Birchett program targeted at the minority areas; approximately 450 illegal absentee ballots were obtained through the O'Brien program in the white areas; and illegal absentee ballots were obtained, for

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example, through Democrat ward leader Christine Solomon in the 53rd ward and Commissioner Tartaglione in the 62nd ward.

175. On the basis of election statistics showing the percentage of absentee ballots cast for Stinson and Marks in each area, the total illegal absentee ballots cast in the election can be allocated to each candidate. Using this method of allocation, Stinson received 446 illegal absentee votes in the minority areas and 692 in the other areas. Marks received fifty (50) illegal absentee votes in the minority areas and 207 in the other areas. Sullivan Testimony, N.T., 3/29/94, at 43; P-212A, at 4 (Analysis B).

176. According to this analysis, the result of the election would be as follows:

	MARKS	STINSON
ORIGINAL VOTE[1]	120,057	20,518
ILLEGAL MINORITY	(50)	(446)
ILLEGAL OTHER	(207)	(692)
TOTAL:	19,800	19,380

177. Based on this approach, Marks won the election by 420 votes. This approach provides a reliability factor by removing absentee ballot votes from Marks, even though the Marks' campaign was not engaged in any illegal conduct, scheme, or

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conspiracy regarding absentee ballots. Defendants did offer evidence to establish that a small number of ballots were handled by Marks workers, but of the approximately twelve (12) votes, none were part of any plan to defraud voters. Thus, if the illegal absentee votes were removed only (or to a greater degree) from Stinson, Marks would have won the election by an even greater margin, approaching 900 votes.

178. In recognition of the Third Circuit's opinion that, in some circumstances, it is appropriate to consider

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[1]There was a discrepancy of five votes for each candidate between the court's February 18 Memorandum Opinion and P-88, the return sheet. To comport with P-88, five votes have been deducted from both Marks and Stinson. To this extent, Dr. Sullivan's calculations, which were based on the court's earlier opinion, have been adjusted.

whether the voters who cast illegal absentee ballot votes would have either gone to the polls or otherwise cast legal votes, Dr. Sullivan calculated a vote "reallocation." This reallocation permitted the recapture of all illegal votes.

179. There is a statistical method by which to reallocate back to each candidate the number of votes that he would have received but for the wrongdoing of the defendants. Sullivan Testimony.

180. First, the total turnout percentages of voters in the District is determined from Board data. These percentages are 18.6% in the minority areas and 43.6% in the other areas. These rates reflect all votes cast in the election, including the absentee ballot votes, even though some voters did not vote for anyone in the senatorial race, and thus overstates the actual turnout figures, a favorable rate for Stinson. Then the turnout percentages are multiplied by the illegal votes. For the minority areas, 496 illegal votes x 18.6% = 92 "recaptured"

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votes. For the other areas, 899 illegal votes x 43.6% = 392 "recaptured" votes. These "recapture" numbers represent a statistically-derived number of illegal absentee votes that would have been legally cast but for the wrongdoing of the defendants. These numbers, if anything, may overestimate the number of voters who would otherwise have lawfully voted in the special election, because the voters targeted by the defendants' unlawful scheme tended to be those who would not normally vote. Sullivan Testimony; Voter Testimony.

181. The recaptured votes can be reallocated to the candidates on the basis of their respective voting machine percentages. This is a sound basis because the distribution

between the candidates of the absentee votes in the "unchallenged" areas of the District (where no illegality is alleged) is not statistically different from the distribution of machine votes. Sullivan Testimony.

182. Using the candidates' voting machine percentages, the allocation of "recaptured" votes is as follows: Out of 92 recaptured minority votes, 71 (76.83%) go to Stinson and 21 (23.17%) go to Marks. Out of 392 recaptured votes in the other areas, 173 (44.04%) go to Stinson and 219 (55.96*) go to Marks.

183. The reallocated "recaptured" votes, added to the previously adjusted tallies for the candidates are as follows:

	MARKS	STINSON
ORIGINAL VOTE	20,057	20,518
ILLEGAL MINORITY	(50)	(446)

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* * *

ILLEGAL OTHER	(207)	(692)
RECAPTURED VOTES		
MINORITY	21	71
OTHER	219	173
TOTAL:	20,040	19,624

184. According to this analysis, Marks would have won the election by 416 votes. As with the prior calculation, this calculation removed a certain number of absentee ballot votes from Marks, even though the Marks' campaign did not engage in any illegal conduct regarding absentee ballots. Thus, if the illegal absentee votes were removed only (or to a greater degree) from Stinson, Marks would have won the

election by an even greater margin, again approaching 900 votes. Sullivan Testimony.

185. The results stated above are to a degree of statistical reliability that exceeds 99%, based on a determination of standard deviations and statistical confidence levels. Sullivan Testimony.

186. On the basis of the above results, Dr. Sullivan concluded that the certification of Marks as the winner of the election is worthy of the confidence of the electorate.

DR. PAUL SHAMAN

187. Professor Paul Shaman testified as an expert on behalf of the intervenors. His testimony also supports the conclusion that Marks would have won the election but for the wrongdoing of the defendants. It should be noted at the outset that Dr. Shaman's research and projections were based upon ranges

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of statistical probability. He did not intend his formula and charts to be used to calculate precise mathematical results. However, as the plaintiffs artfully pointed out on cross-examination, Dr. Shaman's own data and projections ultimately fully support the finding that Marks would have won the election but for the wrongdoing. Dr. Shaman acknowledged that his calculations are not as helpful if a precise number of illegal votes can be determined.

188. Professor Shaman created tables showing, for each of a series of ranges of possible combinations of improper votes, the probability that Marks won the election.

Testimony of Shaman, N.T. 4/8/94, at 17-18. Professor Shaman's tables do not, by themselves, show the actual probability that Marks won the election. Without using "prior information", in other words some specific data, one cannot select an appropriate range in any of Dr. Shaman's tables.

189. Although Professor Shaman did not use any specific data in calculating his analysis, there is other evidence in the record which a statistician may use to determine the probability of a Marks victory. Dr. Shaman did rely upon specific information although specific numbers were not included in his ranges of probability.

190. Given that at least 1,000 ballots were illegally delivered to voters and returned to the Board by the Stinson Campaign and that these ballots represent improper votes for Stinson, the probability of a Marks win is 100% according to

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Shaman's chart. This is so even if 30% of the 1,000 ballots are deemed "recaptured" and entirely allocated to Stinson, which would overcompensate him in correcting for the effects of Stinson's wrongdoing.

191. The analysis of survey research conducted by Dr. Sullivan also provides such data. Dr. Sullivan's Analysis "B" (P-212A, p. 4) projected 1,138 illegal votes for Stinson and "recaptured" 244 for him, giving him a net of 894 "improper" votes in Professor Shaman's terms. It projected 257 illegal votes for Marks and "recaptured" 240 for him, giving him a net of 17 "improper" votes.

192. These data, applied to Professor Shaman's Table 1, also show a 100% probability of a Marks win.

193. Data obtained and used by Professor Shaman himself also can be used to find an appropriate range in his tables, as demonstrated by his testimony under cross-examination. Exhibit P-301, an article in the PHILADELPHIA INQUIRER dated March 25, 1994, which contained data on the results of an investigation into illegal absentee voting in the election in question, was admitted into evidence after being identified as referenced in his expert report. Exhibit I-5.

194. A statistical projection done from the data in Exhibit P-301 shows that, of 1,757 absentee votes cast in the election, at least 636 were illegal without considering "technical illegalities" such as improper delivery and handling

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of ballots by campaign workers. The data show, further, that a projected 94% of these illegal ballots were for Stinson and only 6% were for Marks. Applying these data to Professor Shaman's Table 1, again results in a 100% probability of a Marks win.

195. Because the data in Exhibit P-301 excluded illegal delivery from the count and because the record shows that at least 1,000 ballots were illegally delivered to the Board by the Stinson campaign, a further projection can be done. As Professor Shaman noted, there may be overlap between the 636 ballots and the 1,000 ballots. Some may be in both categories. The most conservative assumption should therefore be used in the absence of a basis for determining the probable overlap.

196. The most conservative assumption is that 100% of the 636 ballots are also part of the group of 1,000. If this group is then allocated on the basis of the data in Professor

Shaman's prior information source, on the basis of 94% and 6%, Stinson has 940 illegal ballots and Marks has 60. With these figures, Dr. Shaman's tables still show 100% probability of a Marks win.

197. Even if a "recapture" calculation were performed, using the turnout ratios and machine vote ratios as Dr. Sullivan did, the results would still be a 100% probability of a Marks win.

198. Professor Ashenfelter's regression analysis, as will be discussed *infra*, when applied to Professor Shaman's tables, also shows a 100% probability of a Marks win. As

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Ashenfelter explained, his linear regression predicted that Marks would win 133 more absentee votes than Stinson. Since Stinson actually got 1,025 more absentee votes than Marks, 1,158 absentee votes are estimated to have been illegal using this method. Because these would be subtracted from Stinson's total, again, there is a 100% probability of a Marks win. N.T. 4/8/94, at 174-176.

DR. ORLEY ASHENFELTER

199. The court appointed Princeton University Professor Orley Ashenfelter as an independent expert. At the time of Dr. Ashenfelter's appointment, the court was not aware that any experts were going to testify. In light of the Third Circuit's mandate, the court wanted to ensure that the opinions of at least one expert were going to be offered. Dr. Ashenfelter's opinions were considered equally with those of the other experts.

200. Dr. Ashenfelter employed a different method of analysis from that of the other experts. The Commissioners' Office provided Professor Ashenfelter with data on the machine and absentee votes for each candidate in the last 21 elections for the state senate in Philadelphia.

201. Dr. Ashenfelter analyzed the relationship between absentee votes and machine votes in these elections and compared that to the absentee and machine vote relationship in the November, 1993 Special Election. He quantified the relationships using regression analysis.

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202. Dr. Ashenfelter's linear regression analysis indicates that, if the 1993 election had been consistent with the historical relationship between machine and absentee voting, Marks would have received 133 more absentee votes than Stinson. This would give Marks an expected overall victory margin of 697 votes, 564 machine votes plus 133 absentee votes. Stinson, however, received 1,025 more absentee votes than Marks according to the results recorded by the defendant Commissioners, a difference of 1,158 votes from the expected result.

203. The 1,158 difference in absentee votes between the candidates in the 1993 election was more than three standard deviations larger than expected result. Such an outcome would therefore be expected to occur in fewer than 1 in 100 cases.

204. Dr. Ashenfelter also performed a quadratic regression analysis to test whether the relationship between the difference in absentee votes and the difference in machine votes may be nonlinear. This analysis indicated that in 1993

Marks should have received 236 more absentee votes than Stinson. This would give Marks an overall victory margin of 800 votes, 564 machine votes and 236 absentee votes.

205. The actual absentee ballot results differed from the expected vote results by 1,261 votes. This result could be expected to occur in fewer than 1 in 100 cases. The statistical confidence level in this result is greater than 99%. Testimony of Dr. Ashenfelter.

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206. According to Dr. Shaman, the quadratic regression analysis has a slightly higher statistical confidence level than the linear one. Testimony of Dr. Shaman. Regression analysis establishes firmly that the 1993 absentee voting difference is not consistent with the historical relationship between machine and absentee voting. Exhibit I-5.

207. The actual difference in absentee votes between the candidates may differ from the statistically expected difference for many possible reasons. After considering all the evidence, the record establishes one predominant reason for the large difference in 1993 from historically and statistically expected relationships: the pervasive scheme of the defendants to obtain absentee ballots for Stinson through illegal and discriminatory means. Stinson's absentee ballot votes were achieved through wrongdoing of numerous sorts: the "new way to vote" program targeted to minority voters; inducing white voters to vote from home for convenience; and the illegal delivery and return of hundreds of absentee ballots pursuant to a scheme involving the Commissioners' Office.

CONCLUSIONS REGARDING EXPERTS' REPORTS AND CERTIFICATION

208. Although there was some disagreement among the experts in their reports, there was substantial agreement among them on the methodologies as well as in the ultimate results discussed in their testimony.

209. As Professor Ashenfelter noted, the 1,158 illegal absentee vote figure that can be estimated from his linear

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regression analysis is not greatly different from the 1,395 figure that Dr. Sullivan projected. Testimony of Ashenfelter, N.T., 4/8/94, at 175.

210. If Ashenfelter's quadratic regression analysis is used, an estimate of 1,261 illegal votes is produced (1,025 + 236), which is even closer to Dr. Sullivan's projection. Exhibit Court-1.

211. Each expert's methodology and testimony independently establishes to a reasonable degree of scientific certainty that Marks would have won a plurality of the legal votes cast in the November 1993 Special Election if the wrongdoing had not occurred and the voters who cast illegal absentee ballots were to have gone to the polls at the established turnout ratios. The three experts employed three different types of analysis and three different types of reports based on different assumptions and data. This variety of analysis lends a great deal of credibility and weight to the finding that Marks would have won the election but for wrongdoing. While the numbers alone establish a very high

likelihood that Marks would have won the election but for wrongdoing, the different expert reports provide the court, and more importantly the electorate (no matter whether the elector cast a ballot at the polls or by absentee), with a much higher degree of reliability. It is impossible to know with all mathematical certainty that Marks would have won but for the wrongdoing, but in light of the totality of the proceedings, the

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court is fully satisfied that Marks would have won the 1993 Special Election but for the wrongdoing and that Stinson failed to receive a plurality of the legally cast votes. Therefore, this court finds that the certification of Marks as the winner of the 1993 Special Election in the Second Senatorial District is worthy of the confidence of the electorate.

212. In sum, the totality of the evidence, from the testimony of the voters to the expert reports, establishes that the defendants conducted an illegal absentee ballot conspiracy and that the Commissioners covertly facilitated the scheme with the specific purpose of ensuring a victory for William Stinson. The Birchett receipts alone are sufficient to establish that William Stinson received in excess of 462 illegal absentee ballots cast by voters who could not have legally voted. However, it was also firmly established that hundreds of other absentee ballots were also cast for William Stinson. Finally, the opinions and reports of all three experts also provide a very high degree of statistical probability that support the finding that Marks would have won the election but for the wrongdoing.

213. The court will order the certification of Bruce Marks as the winner of the 1993 Special Election in the Second Senatorial District, because this court finds that the

record evidence overwhelmingly supports the finding that Bruce Marks would have won the election but for wrongdoing.

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II. Conclusions of Law.

1. Plaintiffs have standing to bring claims regarding violations of the Civil Rights Act, 42 U.S.C. § 1983 and the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (candidate); *Harman v. Forssenius*, 380 U.S. 528 (1965) (voter); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (political party). The enforcement of election laws is necessary to preserve our most basic and fundamental rights. Specifically, this Commonwealth strictly construes the laws concerning absentee ballot voting. *See, e.g., Decision of County Board of Elections*, 29 D. & C.2d 499, 506-07 (1962).

2. This court has jurisdiction pursuant to the Civil Rights Act and the Voting Rights Act. 42 U.S.C. § 1983; 42 U.S.C. §§ 1971, 1973.

Civil Conspiracy

3. A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another', and 'an overt act that results in damage.'" *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980) (citations omitted). In order to prove the existence of a civil conspiracy, a plaintiff is not required to

provide direct evidence of the agreement between the conspir ators; circumstantial evidence may

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provide adequate evidence of a conspiracy. *Id.* at 621 (citations omitted). A plaintiff seeking redress need not prove that each participant in a conspiracy knew the exact limits of the illegal plan or the identity of all participants therein. *Id.* (citations omitted). An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective, or possess the same motives for desiring the intended conspiratorial result. It simply must be shown that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences. *Id.* Defendants engaged in a conspiracy to favor Democrat William Stinson and to disfavor Republican Bruce Marks. This Court is entitled to take an adverse inference when appropriate in a civil case from the Fifth Amendment testimony of various witnesses. *See Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271 (3d Cir. 1986). However, even without any adverse inferences from the witnesses who invoked their rights under the Fifth Amendment, plaintiffs have still established the existence of a broad-based conspiracy involving the Stinson Campaign and the Board.

4. Defendants in this matter were acting under color of state law. Private parties involved in a conspiracy can be liable under 42 U.S.C. § 1983. To act under color of

state law, it is enough that the actor is a willful participant in joint

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activity with the State or its agents. *Adickes v. Fress & Co.*, 398 U.S. 144, 152 (1970). *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). The Stinson Campaign (William Stinson, Joseph Martz, Ruth Birchett, and others) and the Board of Commissioners, through the conduct of Commissioners Tartaglione and Talmadge and their agents, entered into a civil conspiracy. This conspiracy went well beyond a garden variety election dispute, and it did not simply involve minor technical violations of the Commonwealth's Election Code. The Stinson Campaign and the Board of Commissioners engaged in a conspiracy for the purpose of denying hundreds of voters in the Second Senatorial District, specifically Latinos and African-Americans, Bruce Marks, and the Republican party of rights and privileges as set forth in the Constitution and laws of the United States and of the Commonwealth of Pennsylvania. The conspirators intentionally engaged in a plan to promote the Democrat candidate by illegally soliciting and processing absentee ballots to help ensure that William Stinson would receive a plurality of votes in the highly contested Special Election in the Second Senatorial District. Plaintiffs established numerous and repeated violations of law designed to assist Democrat Candidate William Stinson and the Stinson Campaign.

5. Pennsylvania law requires that the Board must immediately notify an absentee ballot applicant if his or her application is rejected. 25 P.S. § 3146.2. The Board,

through the conduct of Commissioners Tartaglione and Talmadge and their

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agents, willfully violated this provision. Commissioner Talmadge even instructed his secretary, Tonya Brown, to "stay out of it" when she attempted to investigate the Board's misconduct in conjunction with the Stinson Campaign. Additionally, Commissioner Talmadge intentionally did not send notice to numerous rejected applicants in order to conceal the illegal solicitation of absentee ballot applications and the subsequent ballots.

6. Pennsylvania law requires absentee ballot applications to be received by the Board prior to 5:00 p.m. on the Tuesday prior to the election. 25 P.S. § 3146.2a. The Board violated this provision by accepting absentee ballot applications after the statutory deadline in order to illegally assist the Stinson Campaign.

7. Pennsylvania law requires that the Board must retain absentee ballot applications as public records for two years. 25 P.S. §§ 3146.2(i), 3146.9. The Board, through the conduct of Commissioner Talmadge and Supervisor Kelly and their agents, willfully violated this provision by returning hundreds of Rejected Applications to the Stinson Campaign to be destroyed pursuant to the instructions of Stinson Campaign Manager Martz. This was done in order to conceal the illegal solicitation of applications and the underlying conspiracy.

8. Pennsylvania law requires that Absentee Ballot Packages be mailed or delivered by the Board to the voter.

The Packages may not be given to campaign or other political workers

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to deliver to voters. 25 P.S. § 3146.5. The Board, through the conduct of Commissioners Tartaglione and Talmadge and their agents, willfully violated this provision by delivering Absentee Ballot Packages to the Stinson Campaign and Democrat Committee persons. Such activity was conducted to further the conspiracy to elect William Stinson.

9. Pennsylvania law requires that the voter complete the absentee ballot and return it either by mail or in person. 25 P.S. § 3146.6. The Board willfully violated this provision by accepting over one thousand completed absentee ballots from Stinson Campaign workers and Democrat Committee persons. Such activity was conducted to further the conspiracy to elect William Stinson.

10. Pennsylvania law requires absentee ballots to be received by the Board prior to 5:00 p.m. on the Friday prior to the election. 25 P.S. § 3146.6. The Board willfully violated this provision by accepting absentee ballots after this statutory deadline. Such activity was conducted to further the conspiracy to elect William Stinson.

11. Pennsylvania law requires the Board to suspend any action in canvassing and computing challenges pending a two (2) day period during which Marks had a right to appeal the Board's decision. 25 P.S. §s 3146.8(e), 3157. The Board willfully violated this provision by certifying William Stinson during Marks' hearing even though the Board knew that

Marks would appeal the Board's decision. The premature certification was issued to

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further the conspiracy to elect William Stinson and to conceal the Board's participation in the conspiracy.

12. The actions of the Board, through Commissioners Talmadge and Tartaglione, and Supervisor Kelly and their agents, constitute a custom and policy of the Board to favor the Democrat William Stinson and disfavor Republican Bruce Marks by knowingly violating provisions of state and federal law. *See, e.g., Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (entity's policy or custom must play part in violation of federal law). A single decision by a municipal body may constitute an act of official government policy under 42 U.S.C. § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). The instant conduct of the Board goes well beyond a single decision. The Board systematically, intentionally, and consistently engaged in a conspiracy to favor the Democrat Candidate and then engaged in an effort to conceal the conspiracy. *Cf. Kasper v. Board of Election Commissioners*, 814 F.2d 332 (7th Cir. 1987) (precinct captains working in conjunction with election judges who permit people to vote more than once constitutes state policy under section 1983). The conspiracy conducted by Commissioners Talmadge and Tartaglione, and Supervisor of Elections Dennis Kelly, and their approval of such conduct by other government workers and Stinson Campaign officials, was an unlawful policy designed to assist the Stinson Campaign and deprive voters of their constitutional right to vote in a free and fair election.

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13. The Stinson Campaign, in conjunction with the Board, specifically targeted Latino and African-American voters to facilitate the absentee ballot conspiracy. At least with respect to the conspiracy as it related to the Latinos, the Stinson Campaign's conduct was especially egregious for its characterization of Latinos as people who would sign anything.

FIRST AMENDMENT VIOLATION

14. Defendants violated plaintiffs First Amendment rights. The conduct of the defendants violated the plaintiffs' right of association guaranteed by the First Amendment by engaging in conduct pursuant to a custom and policy which denied plaintiffs and other individuals the freedom to form groups for the advancement of political ideas, as well as the freedom to campaign and vote for the candidates chosen by those groups. *See Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (*citing Buckley v. Valeo,* 424 U.S. 1, 39-59 (1976)); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). An election campaign is a means of disseminating ideas as well as attaining political office. *See Elections Board v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). The defendants intentionally engaged in conduct designed to favor the Democrat Candidate and disfavor the Republican Candidate. Defendants did not act in good faith, and in any event, good faith is not a justification for a constitutional violation. *See Trotman v. Board of Trustees*

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of Lincoln University, 635 F.2d 216, 227 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981).

EQUAL PROTECTION VIOLATION

15. The defendants actions denied plaintiffs their right to equal protection under the law by intentionally and illegally favoring the Democrat Candidate and discriminating against the Republican Candidate, *see Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991), and by treating persons differently because of their race. After receiving information that they were down in the polls, defendants targeted Latino and African American voters to further a conspiracy to secure illegal absentee ballots. Defendant Stinson argues that plaintiffs have alleged illegal activities throughout the Second District and not just in the minority neighborhoods. This is not completely accurate. Defendants initially were conducting illegal absentee ballot activities in the predominantly Caucasian neighborhoods. After the poll results, the Stinson Campaign, in conjunction with the Board, specifically and intentionally employed a race-based scheme to further their conspiracy to elect William Stinson.

In conducting the conspiracy with the Stinson Campaign, the Board discriminated against the Republican Party and the Marks Campaign and favored the Democrat Party and the Stinson Campaign. Commissioners Tartaglione and Talmadge, and their

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agents, and William Stinson and the Stinson Campaign intentionally and knowingly conducted a massive scheme which violated the Equal Protection rights of the plaintiffs.

SUBSTANTIVE DUE PROCESS VIOLATION

16. The right of all qualified citizens to vote in state elections is constitutionally protected, through the Fourteenth Amendment, against intentional conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Defendants have violated plaintiffs substantive due process rights by conducting willful and intentional conduct which abused and contaminated the organic process by which candidates are elected. The Board intentionally conducted broad gauged unfairness derived from prejudice and bias. *See Griffin v. Burns*, 570 F.2d 1065 (lst Cir. 1978). The willful, knowing, and illegal absentee ballot procedure followed by the Board, and as implemented by the Stinson Campaign, was incapable of preventing absentee ballot illegalities, and the conduct of the Board prevented any possibility of the Commonwealth's court system from reviewing any allegations of fraud. The conspiratorial procedure violated plaintiffs' substantive due process right to a free and fair election. *See Kasper v. Board of Elections Commissioners*, 814 F.2d 332, 343 (7 th Cir. 1987).

VOTING RIGHTS ACT VIOLATIONS

17. The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting. *South*

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Carolina v. Katzenbach, 383 U .S. 301, 308 (1966). *See also Brooks v. Nacrelli*, 331 F. Supp. 1350 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973). Claims brought pursuant to 42 U.S.C. §§1971(a)(2) and 1973(a) must be supported by facts

indicating unlawful racial discrimination in connection with the election process.

> 42 U.S.C. § 1971(a)(2)(A) states:
> (2) No person acting under color of law shall
> (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

42 U.S.C. § 1973(a) states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

18. Plaintiffs have established deliberate racial discrimination by the defendants, acting under color of state law in a broad-based conspiracy, to discriminate against the Republican Candidate and favor the Democrat Candidate. Further, the practice of the Board and the Stinson Campaign was to target voters based on race and to abridge the voters' right to vote. The conduct of the defendants violated these sections of the Voting Rights Act by applying a "standard practice, or procedure

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different from the standards, practices, or procedures" in a discriminatory fashion in favor of presumed supporters of Democrat Stinson over presumed supporters of Republican Marks in the delivery of Absentee Ballot Packages.

19. The Stinson Campaign and Democrat party workers, in conjunction with the Board, conspired to violate the Voting Rights Act by targeting Latino and African-American voters for fraud, intimidation, and deception in order to obtain illegal absentee ballots for Stinson. The defendants violated the Voting Rights Act by conducting an illegal scheme to deny Latino and African-American voters the right to vote freely without illegal interference by Stinson Campaign workers and Democrat committee persons. *See Puerto Rican Legal Defense & Educ. Fund v. Gantt*, 796 F. Supp. 681, 687 (E.D.N.Y. 1992). Plaintiffs have firmly established that defendants violated the above stated sections of the Voting Rights Act.

RELIEF

20. Voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The public interest is served when the courts enforce free and fair elections. *See Reynolds v. Sims*, 377 U.S. 533 (1964). The public interest is served when the integrity of the election process is upheld. Federal courts in shaping equity decrees are "vested with broad discretionary power," *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Donohue v. Bd. of Elections*, 435 F. Supp. 957 (E.D.N.Y. 1976), and have exercised their powers

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in enjoining persons from taking office and voiding elections. *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1969) (election invalidated and candidate enjoined from office); *Ury v. Santee*, 303 F. Supp. 119 (N.D. III. 1969) (municipal election invalidated on due process and equal protection grounds and candidates enjoined from office).

A. CERTIFICATION OF MARKS

21. Pursuant to the mandate of the Third Circuit, this court may order the certification of a candidate if "it finds, on the basis of record evidence, that the designated candidate would have won the election but for the wrongdoing." *Marks v. Stinson*, Nos. 94-1247 and 94-1248, slip op. at 29-30 (3d Cir., March 16, 1994). After three weeks of testimony and after giving full consideration to the standards as set forth by the Third Circuit and in light of the entirety of the admissible evidence, the court concludes that Bruce Marks would have won the election but for the wrongdoing. *Curry v.Baker*, 802 F.2d 1302, 1312-14 (11th Cir. 1986) Accordingly, the court will order the Board to certify Bruce Marks as the winner of the 1993 Special Election in the Second Senatorial District.

22. The electorate may be confident that Bruce Marks will be seated as their Senator because he has established his credentials to fill the vacancy. No elector who legally cast a ballot, whether the ballot was cast at the polls or by absentee ballot, will be disenfranchised by this result. In addition, no

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voter who was illegally induced into voting improperly but who could have otherwise cast a legal ballot will be disenfran chised by this result.

B. FINAL INJUNCTIVE RELIEF AGAINST THE BOARD

23. In light of the broad-based conspiracy of Candidate Stinson, the Stinson Campaign, and the Board, and in light of the Board's failure to fairly conduct its duties during the 1993 Special Election, injunctive relief is appropriate to ensure that voters understand the application procedures and that the Board's procedures are followed so that constitutional and other rights are not violated. From the time when this action was originally filed, the court has been acutely aware that only in the most unusual circumstances should a federal court intervene in an area that is so traditionally state controlled. *See generally Gruenburg v. Kavanagh*, 413 F. Supp. 1132 (E.D. Mich. 1976). Given the facts of this case, there is no reasonable alternative available and the court will therefore enter as final injunctive relief the Order previously entered in this action of February 17, 1994.

24. Various voters testified that they were angered and disillusioned by the Special Election and its aftermath. Many citizens have expressed a common thread of pent up feelings reflecting a long suppressed disgust and outrage at the officials and the system responsible. While this decision resolves the immediate issues and concerns raised by this litigation, it would be a delusion to conclude that the underlying evils which

* * *

conceived and nurtured the wrongdoing involved have been eliminated. Only a concerned citizenry can do that. Only then will they have a permanent and justified confidence in the electoral process.

An appropriate Order follows.

/s/
Clarence C. Newcomer, J.

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 93-6157

BRUCE S. MARKS, et al.

v.

WILLIAM STINSON, et al.

ORDER

AND NOW, this 26th day of April, 1994, consistent with the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the court's previous Order in this matter dated February 17, 1994, granting preliminary injunctive relief is ENTERED as the FINAL and PERMANENT INJUNCTION as follows:

1. The Certification that Defendant William Stinson won a plurality of votes in the November 1993 Special Election issued on November 18, 1993 by the County Board of Commissioners, acting as the Board of Elections, is VOID, as contrary to law;

2. Defendant William Stinson is hereby ENJOINED from acting in any capacity to vote, perform any duties or otherwise act or hold himself out as the duly elected

Senator from the Second Senatorial District of Philadelphia, Pennsylvania;

3. All absentee ballots, applications and materials issued by the defendant County Board of Commissioners, acting as the Board of Elections, from this point forward shall be distributed, at least in the Second Senatorial District, in the English language and in the Spanish language;

4. The County Board of Commissioners, acting in the capacity of the Board of Elections, their agents, servants and representatives and those acting in concert with them are hereby ENJOINED from distributing official absentee ballot material to any candidate or representatives of any candidate in connection with any election in a discriminatory manner. The official absentee ballot material, which is distributed from the County Board of Elections for use in primary or general elections after the receipt of a duly qualified absentee voter application processed pursuant to the Election Code 25 P.S. §3146.2b, SHALL only be distributed by mailing same to the voter, or by hand delivery to the voter, pursuant to 25 P.S. §3146-5;

5. The defendant County Board of Commissioners, acting in the capacity of the Board of Elections, their agents, servants and those acting in concert with them are hereby further ENJOINED from receiving any official absentee ballot materials or declarations from any candidate or candidate's workers, or by anyone other than the voter. The Board of Commissioners shall only accept such ballots if delivered to them in person by the voter, or mailed to them by the voter, pursuant to 25 P.S. §3146.6;

6. The County Board of Commissioners, acting as the Board of Elections, SHALL maintain all official absentee ballot applications and all other absentee ballot materials in its

possession for public access, and is ENJOINED from delivering or returning such records to any agent or other representative of any political party or candidate pursuant to 25 P.S. §3146.9.

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* * *

7. The defendant County Board of Commissioners, acting as the Board of Elections, is ENJOINED from employing discriminatory practices which involve applying the Election Code or any other law in a manner that favors or disfavors a candidate;

8. The County Board of Commissioners, acting as the Board of Elections, its agents, representatives, and those acting in concert with them are further ORDERED to take all steps necessary within the office of the County Board of Elections to enforce the terms of this Order and to comply with the terms of the Election Code and other laws.

IT IS FURTHER ORDERED that:

9. The County Board of Commissioners, acting as the Board of Elections, is ORDERED to RECERTIFY the results of the 1993 Special Election in the Second Senatorial District based on the finding and conclusion that Bruce S. Marks received a PLURALITY of the legally cast votes, or in other words, that Bruce S. Marks would have won the election BUT FOR the wrongdoing. Such recertification is to be completed within forty-eight (48) hours of the date of this Order and is then to be transmitted forthwith to the Secretary of the Commonwealth as required by law;

10. The Absentee Ballot Applications utilized by the Philadelphia City Commissioners in the Second Senatorial

District SHALL PROVIDE a space in which the elector shall state the reason

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* * *

for his or her absence from the county pursuant to 25 P.S. §3146.2(e)(1);

11. All other provisions of the Election Code SHALL BE ENFORCED;

12. Judgment is ENTERED in FAVOR of plaintiffs;

13. Judgment is ENTERED AGAINST defendants; and

14. A hearing on damages will be scheduled by further Order of this court.

AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, J.

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* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 94-1247 AND 94-1248

BRUCE MARKS; KATHY STECK,
ON BEHALF OF THE VOTERS OF THE SECOND DISTRICT;
EMANUEL LORENZO; LYDIA COLON; LILLIAN CRUZ;
DIANA IRIZARRY; RUTH MARTINEZ; ZORAIDA RODRIGUEZ; YESENIA VASQUEZ;
REPUBLICAN STATE COMMITTEE

v.

WILLIAM STINSON;
THE WILLIAM STINSON CAMPAIGN;
PHILADELPHIA COUNTY BOARD OF ELECTIONS;
MARGARET M. TARTAGLIONE; JOHN F. KANE;
ALEXANDER Z. TALMADGE, JR.
AND VARIOUS DOE AND ROE DEFENDANTS

SENATOR WILLIAM STINSON,
Appellant in No. 94-1247

PHILADELPHIA COUNTY BOARD OF ELECTIONS,
MARGARET M. TARTAGLIONE, JOHN F. KANE
AND ALEXANDER TALMADGE, JR.,
Appellants in No. 94-1248

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN,
MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN,
MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN
AND ROBERT W. LES,
Intervenors-Appellants, as per the Court on 3/9/94,
in Nos. 94-1247 and 1248

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL ACTION NO. 93-CV-06157)

ARGUED MARCH 10, 1994

BEFORE: STAPLETON, GREENBERG, and COWDEN,
Circuit Judges

(OPINION FILED: MARCH 16, 1994)

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* * *

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OPINION OF THE COURT

STAPELTON, *Circuit Judge*:

After an evidentiary hearing on the plaintiffs' motion for a preliminary injunction, the district court in this case found that certain officials responsible for conducting an election in the second senatorial district of the Commonwealth of Pennsylvania had conspired with one of the two candidates to cause numerous illegally obtained absentee ballots to be cast. Based on that finding, the district court issued a preliminary conspiracy from exercising any of the authority of the

office of state senator and directed the board of elections to certify the result of the election based solely on the votes cast at the voting machines. The effect of the preliminary injunction was to require the decertification of the candidate previously declared to be the winner and the certification of his opponent.

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In this appeal from the preliminary injunction, we are asked to declare that the district court abused its discretion by refusing to abstain and by fashioning an unreasonable interim remedy.

I.
INTRODUCTION

Republican Bruce Marks ("Marks") and Democrat William Stinson ("Stinson") ran in an election conducted on November 2, 1993, to represent Pennsylvania's second senatorial district. This election was held to fill the remaining portion of a term expiring in December 1994, and was of particular significance to both Republicans and Democrats because control of the Pennsylvania Senate was at stake. According to the certified results of the Philadelphia County Commissioners, sitting as the County Board of Elections ("the Board")[1], of the 38,818 votes cast on the voting machines on election day, 19,691 were cast for Marks, while 19,127 were cast for Stinson. However, of the 1,767 absentee ballots cast, Marks received only 371 votes, while Stinson received 1,396

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[1] In Philadelphia County, the Board is made up of two Democratic County Commissioners (Alexander Z. Talmadge, Jr., and Margaret M. Tartaglione) and one Republican County Commissioner (John F. Kane).

votes. When all votes were added together, Stinson won by a final count of 20,523 to 20,062. The Board, therefore, certified Stinson as the winner of the election and he was subsequently sworn in as a Pennsylvania state senator.

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Marks, the Republican State Committee, and eight named voters who reside in the second senatorial district (two of whom are residents who voted at the polling place in the election at issue, and six of whom are Latino residents of this same district who voted by absentee ballot) brought this suit alleging violations of the Voting Rights Act and the Civil Rights Act in connection with the election. The defendants are Stinson, the Stinson campaign, unnamed individuals who worked for the Stinson campaign, the Board, and Board members Margaret M. Tartaglione, John F. Kane, and Alexander Z. Talmadge, Jr. Defendants are joined as appellants by ten intervenors who are voters who legally cast absentee ballots and who allege that the preliminary injunction disenfranchised them.

Under Pennsylvania law, a qualified elector may vote by absentee ballot if he or she is, *inter alia*, absent from the Commonwealth or county of residence "because his duties, occupation or business require him to be elsewhere during the entire period the polls are open" or is physically unable to go to the polls. 25 P.S. § 3146.l(j) & (k). An elector who wishes to vote by absentee ballot must submit to the appropriate board of election an absentee ballot application, including a statement that the elector expects to be out of the county on election day or that the elector is physically unable to go to the polls, with a declaration stating the nature of the disability and the name,

address, and telephone number of the attending physician. 25 P.S. § 3146.2(a) & (c)(1) & (c)(2). The absentee ballot

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application requires that the elector provide a "post office address to which [the] ballot is to be mailed." The deadline for the receipt of applications is 5:00 p.m. on the Tuesday before the election. 25 P.S. §3146.2a.

Absentee ballots applications are processed by the local board of elections to determine if the applicant possesses all necessary qualifications. If the board is satisfied that the applicant is a qualified elector, the application is marked "approved." 25 P.S. §3146.2b(a). If the board concludes that the applicant is not qualified, it must immediately notify the applicant. 25 P.S. §3146.2b(d). After approving an absentee ballot application, the board of elections is required to "mail or deliver" an absentee ballot package to the elector at the address listed on the application. 25 P.S. § 3146.5. The absentee ballot package consists of an outer envelope in which is enclosed a declaration envelope, an inner envelope, and instructions. 25 P.S. § 3146.4.

The elector must mark the ballot "in secret," seal the ballot in the inner envelope, seal the inner envelope in the declaration envelope, and execute the declaration on the declaration envelope. 25 P.S. § 3146.6(a). An elector may legally receive assistance in filling out the absentee ballot only if the elector has a physical disability that "renders him unable to see or mark . . . the ballot." 25 P.S. § 3146.6(a). The elector must then "send by mail" or deliver "in person" the

executed declaration package to the board of elections. 25 P.S.

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§ 3146.6. To be valid, all absentee ballots must be received by 5:00 p.m. on the Friday before the election. 25 P.S. § 3146.6(a). If an elector who sent in an absentee ballot becomes able to get to the polls on election day, the absentee ballot is void as a matter of law, and the elector has a duty to go to the polls and void the ballot. 25 P.S. §3146.6(b).

Election day pollwatchers for each candidate may challenge any absentee ballot at the polling place at the time the polls close. 25 P.S. §3146.8(c). The unchallenged absentee ballots are canvassed after the polls close by opening the declaration envelopes, removing, mixing, and opening the sealed inner envelopes, and then counting the ballots. 25 P.S. §3146.8. All challenges are heard by the county board of elections within seven days and the board's decision is appealable to the Court of Common Pleas. 25 P.S.§3146.8(e).

II.
THE DISTRICT COURT'S DECISION

A. FINDINGS OF FACT

Following a three day hearing during which extensive testimony was presented, the district court issued detailed findings of fact which we now summarize.

The Stinson campaign sent its workers into divisions of the district where a majority of the residents were white to solicit voter registration applications and absentee ballot applications. The goal was to obtain twenty absentee ballot

applications from each division. Those who expressed a hesitancy

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to register because they did not wish to go to a polling place were told by campaign workers that they could fill out an absentee ballot application and obtain an absentee ballot as a matter of convenience. Many improper applications were received based on this misrepresentation. These absentee ballot applications stated that the basis for voting absentee was that the applicant would be out of the county at the time of the election, despite the fact that the applicant had no reason to believe that this would be the case. To conceal the fact that many of these improper absentee ballot applications were solicited several months before election day, Stinson campaign workers told canvassers not to fill in the true date on the application. The absentee ballots that the Stinson campaign obtained in this way were then submitted directly to Commissioner Tartaglione's office and the corresponding absentee ballot packages were provided directly to the Stinson campaign. According to the testimony of one campaign worker, Stinson was aware of the improper conduct regarding the absentee ballots, yet he permitted the conduct to continue and even admonished campaign workers who questioned its legality.

About three weeks before the election, the Stinson campaign learned that a Democratic State Committee poll showed Marks running ahead of Stinson by four percentage points. The campaign responded by saturating the Hispanic and African-American areas of the district with absentee ballot

applications using tactics similar to those earlier employed. This time,

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however, campaign workers solicited absentee ballot applications in person and by telephone by telling the Latino and African-American voters that there was a "new way to vote" from the convenience of one's own home. Campaign workers were paid $1.00 for each application or ballot that they were able to obtain in this way, and the campaign dispensed at least $500 to $700 dollars in this effort.

The Stinson campaign obtained approximately 1,000 absentee ballots applications from the minority sections of the district. The applications were then delivered by Stinson campaign workers directly to Commissioner Talmadge, and he provided the absentee ballot packages directly to the Stinson campaign. Stinson campaign workers then took the absentee ballots directly to applicants' homes. In numerous instances, Stinson workers executed applications, ballots and declarations without the voter understanding the nature of the document. In other instances, Stinson workers instructed the voter to check certain places on the ballot, or filled out and forged the ballot. Voters were also assisted in completing applications and declaration packages after the statutory deadline for receipt by the Board had passed, and such ballots were counted by the Board. Many voters who cast absentee ballots testified that they were unaware that they had signed absentee ballot applications.

Almost 400 of the absentee ballot applications submitted by the Stinson campaign were rejected by the Board because they came from unregistered voters. These rejected

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applications were returned directly to Commissioner Talmadge, who then returned them to a Stinson campaign worker. Contrary to state law, no record was kept of the rejected applications.

Commissioners Tartaglione and Talmadge and Board employees working with them were aware of the absentee ballot campaign of Stinson and his workers and assisted that campaign by delivering hundreds of absentee ballot packages directly to Stinson workers rather than mailing or delivering them to the electors whose names and addresses appeared on the applications. This assistance was designed to aid the Stinson campaign in obtaining more votes through personal contact between the electors and the Stinson campaign workers. No such assistance was provided to Marks or the Marks campaign. During regular office hours, employees of the Board mailed all absentee ballot packages to the voters whose applications they had approved. The Board's assistance to the Stinson campaign was covert and was not disclosed to Republican Commissioner Kane at the time.

B. CONCLUSIONS OF LAW

After setting forth its factual findings, the district court concluded that the plaintiffs had established a likelihood of success on their claims. Specifically, the court found a likelihood of success on the claims that the defendants' conduct violated: "i. the First Amendment rights of Plaintiffs by illegally discriminating in favor of Democrat Stinson over

Republican Marks. . . . ii. the equal protection rights of Plaintiffs by illegally discriminating in favor of Democrat

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Stinson over Republican Marks with no rational reason or purpose [, and] the substantive due process right of Plaintiffs to a free and fair election." The district court also found that a likelihood of success had been shown with respect to the plaintiffs' Voting Rights Act claims. Finally, the district court concluded that plaintiffs, "and even the entire state," suffer irreparable injury when an "improperly seated . . . representative" of the people exercises the powers of his office and when "constitutional freedoms" are lost.

Having determined that a preliminary injunction should be issued, the district court turned to the form of the interim relief to be granted. The court stated in part:

> In light of the massive scheme of Candidate Stinson and the Stinson Campaign, and in light of the failure of the Board to fairly conduct its duties, it would be grossly inequitable to allow Stinson to remain in office and for the Board to continue to conduct business as it did during the 1993 Election. . . .
>
> The votes cast at the voting machines were not affected by the improper conduct of the Stinson Campaign or the Board, and no evidence indicates that the machine returns do not reflect the will of the electorate. The District should not be denied representation in the State Senate based on the efforts taken by the Stinson Campaign and the Board to conceal

> certain conduct relating to the absentee balloting procedures. . . .
>
> The will of the electorate is reflected in the votes cast on the voting machines. The public interest will be served by having Marks, the candidate who prevailed on the undisputed legal votes, serve the remaining months of the term, which expires in December, 1994, rather than declaring the
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> *Original Page 12*
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> seat vacant and scheduling a new election at the May primary.

Marks v. Stinson, No. 39-6157, slip op. at 32-33 (E.D. Pa. Feb. 17, 1994).[2]

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[2]Defendants Tartaglione and Talmadge maintain that they were without notice that preliminary injunctive relief against them was being sought in federal court. They point out that plaintiffs' motion for preliminary injunctive relief was directed solely to Stinson, as were the amended complaint and the pre-hearing memorandum. Notice, however, is required under Fed. R. Civ. P. 65(a) which provides: "No preliminary injunction shall be issued without notice to the adverse party." The order and findings of the district court therefore should be vacated, according to these defendants.

We disagree. At the preliminary injunction hearing on February 7, the plaintiffs' attorney made clear that plaintiffs would be attacking the Board's conduct and seeking injunctive relief against the Board:

> [T]he County Board of Commissioners aided and abetted the Democratic Party in the facilitating of this

(continued...)

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[2](...continued)
fraud by making . . . absentee ballots . . . available in quantities in the hundreds, when the statute says that they should be mailed to the voter or delivered in person and they shall be received back by the voter in person. . . .

* * *

We will also produce for Your Honor on the same issue with respect to the abuse by the Democratic County Commissioners evidence that this was not a unique area. . . . We will produce evidence that the standard practice [was] hand[] delivery of a ballot to somebody, waiting while they vote and giving them literature, and that the facilitating of that problem was designed by the County Board of Commissioners in permitting the statute to be violated in that gross, unlawful manner.

The second issue is that the application to vote absentee is in English, English only. . . . [We will show that this is illegal] under the Voting Rights Act and the Civil

(continued. . .)
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(...continued)
Rights Act. . . .

We will take the position that those acts and that surrounding what I talked to the Court about with respect to the facilitation of votes in the hands of a worker who's committed to get the vote for the client, is a discriminatory practice and *we will ask the Court to enjoin the County Board of Commissioners* from violating that practice in the future. . . . [W]e expect to be using Monday and Tuesday on the fraud issue and Wednesday and Thursday on wrapping up the issues with respect to the County Board of Commissioners.

(continued...)

III.
THE STATE PROCEEDINGS

The evidence and the factual findings of the district court clearly support its conclusion regarding the existence of irreparable injury and the likelihood of success on plaintiffs' Civil Rights Act claims, i.e., that the defendants operating under color of state law violated plaintiffs' rights under the First and Fourteenth Amendments.[3] As a result, the briefing and oral arguments in these appeals have focused primarily on

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[2](...continued)
2 App. 1075-78 (emphasis added). The counsel for the Board, in his remarks at the opening of the preliminary injunction hearing on February 7, acknowledged the plaintiffs' accusations and his intent to put forth a defense:

> Our . . . interest is in responding to the very scurrilous attacks directed . . . at the Commissioners. . . . We will meet those challenges. . . . I am here to defend my clients. I cannot tell the Court how long that defense will take because we do not know what the plaintiffs' case will be. I will work with the Court to make our defense as concise as possible, but because of the nature of the attacks mounted against my clients, I owe them a full defense to meet these scurrilous charges.

2 App. 1087-89. Our review of the record has satisfied us that the members of the Board participated fully in the expedited discovery ordered by the district court and that all of the issues resolved by the court were litigated with the consent of all the parties, including the members of the Board.

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[3]Defendants vigorously deny that a likelihood of success has been demonstrated with respect to plaintiffs' Voting Rights Act claims. We have no occasion to reach that issue and express no opinion thereon.

defendants' contentions that the district court should have abstained and should not have granted the relief which it did. In order to understand the first of these issues, some knowledge of the state proceedings in this controversy is required.

On November 1, Marks appeared before Judge Gregory E. Smith of the Philadelphia County Court of Common Pleas with a Petition for Emergency Relief and Temporary Restraining Order. Marks requested that all absentee ballots in the district "be held impounded and deemed challenged" because "numerous voters were told they could vote by absentee ballots based on convenience." Stinson's lawyers opposed Marks' request and Judge Smith refused to hear Marks' evidence of fraud, instead referring the matter to the election day judge.

On election day, November 2, Marks appeared before Judge Edward J. Maier of the Philadelphia County Court of Common Pleas with a Petition for Emergency Relief. Stinson's lawyers opposed Marks' request, as did the Democratic City Committee and the Board, and Judge Maier refused to hear Marks' evidence of fraud. Judge Maier, however, retained jurisdiction. Also on

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election day, the Marks campaign attempted to challenge 551 absentee ballots at polling places in accordance with 25 P.S. §3146.8(e), but 351 absentee ballots were opened in apparent violation of 25 P.S. §3146.8(a).

On November 3, Judge Maier began to consider Marks' absentee ballot challenges in contravention of 25 P.S. § 3146.8(e) which provides that the Board is to hear initial challenges. Also represented before Judge Maier were Stinson, the Board, the Senate Republican Campaign Committee, the

Democratic City Committee, and a public interest group known as the Committee of the Seventy. Judge Maier found that Marks' challenges to all but 11 absent ballot were meritless and, on November 9, the Board proceeded to open the 200 challenged absentee ballots that had not yet been unsealed.

Marks and the Republican State Committee filed an emergency petition with the Pennsylvania Supreme Court on November 10 to stay further proceedings. The Supreme Court granted Marks' motion on November 13. On November 17, the Supreme Court ruled that Judge Maier lacked jurisdiction over initial consideration of absentee ballot challenges under 25 P.S. § 3146.8(c). The matter was thus remanded to the Board.

On November 18, voters from the second senatorial district began an election contest pursuant to 25 P.S. § 3401. Also on November 18, the Board convened to consider Marks' challenge to the absentee ballots pursuant to 25 P.S.

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§ 3146.8(c). Stinson, the Republican State Committee, and the Democratic City Committee, along with Marks, were represented before the Board. Marks attempted to present evidence of electoral fraud, but the Board heard from only one witness before determining that it could only consider testimony from authorized pollwatchers. None being present, the Board rejected all 551 challenges to the absentee ballots and certified Stinson as the winner.

The federal district court made the following finding of fact with respect to the Board's November 18th certification of Stinson:

99. On November 18, 1993, the Board certified Candidate Stinson as the winner of the election from the Second Senatorial District. However, this was done during the course of a public hearing prior to " concluding the Board's findings of fact and conclusions of law. The decision to certify Stinson was made on November 18, 1993 when all other candidates for Election in the County of Philadelphia were certified on November 22, 1993.

100. The Board certified Stinson during the hearing even though Commissioner Talmadge knew that the Election Code provided two days to appeal a decision of the Board with respect to challenges and even though he knew Marks was going to appeal. Marks did appeal. 25 P.S. §3146.8(e) requires the County Board to suspend any action in canvassing, computing, and certifying the winner pending the 48 hour period during which Marks had a right to appeal the City Commissioners' decision and 25 P.S. §3157 requires the Board to suspend certification pending such appeal.

101. The actions of the Board were designed to, and did in fact, prevent any realistic opportunity to appeal the

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certification in the State court system. The Board applied the Election Code in a discriminatory manner designed to favor one candidate. Certifying Stinson in this manner would end

> inquiries into the election abuse in which Commissioners Tartaglione and Talmadge participated. The Board conducted nothing more than mock hearings and intentionally reached decisions that would not reveal their involvement in the ongoing absentee ballot voting scheme. . ..
>
> The appeal and challenge structure is grounded in the rudimental supposition that the process is fair and not inherently flawed. The Stinson Campaign activities relating to the absentee ballots were improper. Nonetheless, this abuse should have been corrected by the Board. The improper actions of the Board deprived the plaintiffs from ever having their claims heard. Based on the Board's decision with reference to the challenges, the Board deprived the Court of Common Pleas of jurisdiction to consider plaintiffs' substantive claims. In short, the Board participated in an improper scheme and were then called upon to sit in judgment of that very conduct.

Marks v. Stinson, No. 93-6157, slip op. at 22-24 (E.D. Pa. Feb. 17, 1994).

On November 19, Marks and the Republican State Committee appealed the Board's dismissal of the absentee ballot challenge to Common Pleas Court. In addition, Marks filed an emergency petition with the Pennsylvania Supreme Court to request a stay to prevent Stinson from voting when the Pennsylvania Senate reconvened. The Pennsylvania Supreme Court refused to entertain a hearing or grant a stay.

On November 22, the Pennsylvania Senate reconvened.

The President of the Senate, Lt. Gov. Mark S. Singel, a Democrat,

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ruled that Stinson was properly seated. Sen. Robert. C. Jubelirer, a Republican, objected, claiming that the Board's certification of Stinson was invalid. The Senate voted 25-24 that Stinson was "eligible to vote on his own seating in the Senate," with Stinson casting the decisive vote. The Senate then voted 25-24 that Stinson was "properly seated as a member of the Pennsylvania Senate," with Stinson again casting the decisive vote. *See Jubelirer v. Singel*, 1994 Pa. Commw. LEXIS 68 (Pa. Commw. Ct. Feb. 9, 1994) (*en banc*).

The appeal from the Board's dismissal of the absentee ballot challenge was heard on December 14 before Judge Mark I. Bernstein of the Philadelphia Court of Common Pleas. Marks and the Republican State Committee understood their appeal to be authorized under 25 P.S. §3146.8 & §3157 and attempted to present evidence of electoral fraud, but Judge Bernstein found that he could consider only what had been presented to the Board:

> [Marks and the Republican State Committee] . . . ask[] the Court to assume plenary jurisdiction over any and all electoral abuses. . . . This the Court may not do. Jurisdiction is limited to reviewing the decisions of the County Board from which an appeal was taken; and if erroneously made, reversing those decisions. . . . [C]hallenges to absentee ballots must initially be presented to the County Board for determination. If their determination was proper, this Court has no jurisdiction to go further.

In re General Election Contest Second Pennsylvania State Senatorial District, Court of Common Pleas of Philadelphia County (Civ. Div., Nov. Term 1993, No. 2887, issued Jan. 10, 1994), slip

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op. at 12–13. Judge Bernstein accordingly affirmed the Board's certification of Stinson.

Judge Bernstein also was assigned the election contest being pursued under 25 P.S. §3401. He ruled that the voters were required to post a $50,000 bond under 25 P.S. §3459. The bond was not raised and, on January 10, Judge Bernstein dismissed the contest without providing a hearing on the merits. With respect to election contest petitioners Steck and Lorenzo, the district court found that they "were not given a 'realistic opportunity to fully and fairly litigate' constitutional claims in state court if they were required to post a $50,000 bond to proceed." *Marks v. Stinson*, No. 93-6157, slip op. at 4 (E.D. Pa. Feb. 7, 1994).

Marks and the Republican State Committee have appealed Judge Bernstein's dismissal of the absentee ballot challenge to the Pennsylvania Supreme Court. That appeal is currently pending. Marks has appealed the dismissal of the election contest to the Pennsylvania Senate which has scheduled no proceedings thereon.[4]

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[4]Under Pennsylvania law, only the candidate has standing to appeal an election contest to the legislature. *See* 25 P.S. § 3507.

IV.
ABSTENTION

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358

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(1989). "Underlying [this] assertion[] is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *Id.* (*citing Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922)). "However, because federal courts do have discretion in determining whether to grant certain types of relief, abstention is appropriate in a few carefully defined situations." *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1199 (3d Cir. 1992). "Thus, there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" *New Orleans Pub. Serv.*, 491 U.S. at 359 (*quoting Younger v. Harris*, 401 U.S. 37, 45 (1971)). Abstention, nevertheless, is the exception and not the rule. "[T]he federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" *Id.* (*citing Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)).

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that federal courts should abstain from enjoining state criminal prosecutions absent extraordinary circumstances. The Supreme Court has since expanded the reach of Younger to noncriminal judicial proceedings in which important state interests are involved. *Middlesex County Ethics Comm. v.*

Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). *Younger* abstention "reflects a strong federal policy against federal-court

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interference with pending state judicial proceedings." *Id.* at 431.

Although Younger abstention is founded on notions of comity, "the [mere] pendency of an action in state court is no bar to proceedings concerning the same subject matter in the Federal court having jurisdiction." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "The presence of two parallel suits . . . does not run afoul of *Younger*." *Schall v. Joyce*, 885 F.2d 101, 112 (3d Cir. 1989). This is true even in cases where there exists a "potential for conflict in the results of adjudications." *Colorado River*, 424 U.S.. at 816; *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). A federal court will only consider *Younger* abstention when the requested equitable relief would constitute federal interference in state judicial or quasi-judicial proceedings. *Middlesex*, 457 U.S. at 431; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599-600 (1975). Thus, while a proponent of abstention must show (1) there are ongoing state proceedings involving the would-be federal plaintiffs that are judicial in nature, (2) the state proceedings implicate important state interests, and (3) the state proceedings afford an adequate opportunity to raise the federal claims, *Middlesex County*, 457 U.S. at 432, such a showing does not require that the federal court abstain. "[W]here federal proceedings parallel but do not interfere with the state proceedings, the principles of comity

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underlying Younger abstention are not implicated." *Gwynedd Properties*, 970 F.2d at 1201.[5]

Before proceeding to the facts of this case, it is also important to recognize that a person with a federal Civil Rights Act claim has no duty to exhaust state remedies before pursuing his or her claim in the federal courts. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Younger* principles must be applied in a manner consistent with this well established proposition. As we noted in *Monaghan v. Deakins*, 798 F.2d 632, 638 (3d Cir. 1986), *aff'd in part and vacated in part*, 484 U.S. 193 (1988), "in no case has the Supreme Court or this court ever turned the propriety of a Younger dismissal upon the mere availability of a state judicial proceeding.[6] Thus, the

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[5]. Even if the equitable relief asked of the federal court would involve intervention in an ongoing state proceeding, the court must not abstain "if the state proceedings are being undertaken in bad faith, or if there are other extraordinary circumstances such as where the state proceedings are based on a flagrantly unconstitutional statute." *Gwynedd Properties*, 970 F.2d at 1200 (citation omitted). Neither of these circumstances exists here.

[6]Other forms of abstention may require a would-be federal plaintiff to seek relief in the state system. *See Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993) (reviewing *Burford* abstention, *Pullman* abstention, and *Colorado River* abstention). Defendants raise only one of those doctrines here, arguing that the district court should have abstained under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). We note initially that defendants did not ask the district court to abstain under *Pullman* and raised the issue for the first time on appeal. Moreover, *Pullman* abstention would have been inappropriate here.

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The *Pullman* doctrine provides that "when a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitu-

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plaintiffs in this proceeding could have proceeded in federal court without having resorted to the state's judicial process." In the absence of a

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[6](...continued)
tional question, abstention may be justified under principles of comity in order to avoid needless friction with state policies." *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991) (internal quotations and citations omitted), *cert. denied*, 112 S. Ct. 1265 (1992).

Defendants insist that it is uncertain whether Pennsylvania election law allows an election board to permit campaign workers to deliver absentee ballots to voters. Defendants also argue that it is uncertain whether an election board must wait two days after rejecting absentee ballot challenges before certifying a winner in order to permit an appeal. Abstention therefore would be appropriate, according to defendants, because "a definitive state court ruling on the election laws would narrow the scope of the constitutional issues now before the Court." Stinson Brief 31.

We disagree. While the phrase "mail or deliver" in 25 P.S. § 3146.5 may be ambiguous as applied in some contexts, we are confident that the Pennsylvania courts would not construe it as authorizing an election board to give ballots to a candidate for delivery to voters, much less to one candidate and not his or her opponent. With respect to the waiting period, we find 25 P.S. §§ 3146.8 and 3157 neither ambiguous nor material to the federal issues presented in this case. As the Supreme Court has noted:

> [Pullman abstention] contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction.

Harman v. Forssenius, 380 U.S. 528, 535 (1965) (citations omitted).

showing of some potential for interference with an ongoing state proceeding, *Younger* principles do not bar a Civil Rights Act

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plaintiff from going forward in a federal forum simply because there are unexhausted possibilities for state litigation over the same subject matter.

This principle is equally applicable where the plaintiff previously has been involved in state proceedings. Every state has a process for enforcing merits judgments entered by its courts and that process is, of course, an integral part of the state's judicial process for *Younger* purposes. *Younger* thus bars a federal plaintiff from securing relief against the enforcement of an adverse judgment against him on the merits. *See e.g. Huffman*, 420 U.S. at 592 (*Younger* abstention appropriate where plaintiff sought injunctive relief in federal court rather than appealing state trial court judgment within the state system); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (abstention under *Younger* required where plaintiff requested an injunction enjoining the execution of a state judgment). Such relief would constitute a direct intervention of the federal court in the state judicial process and the federal plaintiff can proceed in federal court in such a situation, if at all, only after securing a reversal of the judgment in the state courts.

This does not mean, however, that failure to exhaust state appellate remedies will always bar access to the federal courts under *Younger*. Exhaustion of appellate remedies is required by *Younger* only when the federal proceedings seek effectively to annul the state judgment. In *Wooley v.*

Maynard, 430 U.S. 705 (1977), the Supreme Court distinguished Huffman on

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precisely this basis. The federal plaintiff there sought prospective relief against an allegedly unconstitutional statute under which he had been convicted. The federal defendants urged that Younger was applicable because the plaintiff had not appealed his conviction. The Court observed:

> Appellants, however, point out that Maynard failed to seek review of his criminal convictions and cite *Huffman v. Pursue, Ltd.*, *supra*, for the propositions that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court," 420 U.S. at 608, and that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies," *id.*, at 609. *Huffman*, however, is inapposite. There the appellee was seeking to prevent, by means of federal intervention, enforcement of a state-co urt judgment declaring its theater a nuisance. We held that appellee's failure to exhaust its state appeals barred federal intervention under the principles of *Younger*: "Federal post-trial intervention, in a fashion designed to annul the results of a state trial . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil

> litigation over which they have jurisdiction." *Ibid.*
>
> Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights.

Wooley, 430 U.S. at 710-11.

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This is not a case in which the federal plaintiffs[7] are seeking relief which will in any way impair the ability of the state courts of Pennsylvania to adjudicate anything that is

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[7]Throughout this section, we refer to the federal plaintiffs collectively. Our doing so does not reflect a rejection of their substantial arguments that they should each be regarded as separate entities for *Younger* purposes. The plaintiffs who describe themselves as "Latino plaintiffs" have been a party to no state proceeding. Plaintiffs Steck and Lorenzo were denied access to the only proceeding they sought to join when they failed to post a $50,000 bond and they had no right to appeal from that denial. It is only Marks and the Republican State Committee who are currently parties to any state proceeding. The plaintiffs other than Marks argue that they are entitled to go forward even if Marks cannot. The defendants, on the other hand, insist that abstention is appropriate as to all plaintiffs under *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The Supreme Court there recognized that there are "some circumstances in which legally distinct parties are so closely related that they should be subject to *Younger* considerations which govern any one of them." *Id.* at 928-29. This court has never had occasion to rule on whether voters and the candidate of their choice are such "closely related" parties and we decline to do so here. Since we conclude that Marks may go forward, we reserve that decision for another day.

currently before them. When this suit was filed, plaintiffs Marks, Steck, and Lorenzo had instituted two proceedings challenging the election, both of which were then before the Court of Common Pleas. The federal suit did not directly or indirectly ask the court for any relief with respect to those state proceedings. The plaintiffs were simply pursuing parallel tracks seeking consistent relief in the federal and state systems.

In retrospect, plaintiffs' decision to pursue parallel tracks seems to have been a prudent strategy. By the time the district court was asked to abstain on *Younger* grounds and to

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decline to entertain plaintiffs' motion for a preliminary injunction, the Court of Common Pleas had refused in both proceedings before it to hear the evidence upon which plaintiffs' federal claims are based. In one instance, the court held that its jurisdiction was limited to the scope of the review the Election Board chose to conduct. In the other, it held that it could not go forward unless the plaintiffs posted a $50,000 bond. In the meanwhile, Stinson had been certified as the winning candidate, had been seated as a member of the State Senate based on his own vote, and had been exercising the prerogatives of that office for three months, a substantial portion of the term for which he was elected. With four months having passed without even a hearing in the state court at which they could present their evidence, the federal plaintiffs understandably turned to the federal court for relief. The interim relief they sought, once again, did not involve any restraint, direct or indirect, on the state's judicial process.

It is true, as defendants stress, that when the district court declined to abstain, one appeal was pending in the Supreme Court of Pennsylvania and another appeal, Marks'

appeal in the election contest proceeding, was pending in the State Senate. As we have explained, however, *Younger* does not require federal plaintiffs to exhaust their appellate remedies unless the relief being sought from the federal court involves disruption of the state's judicial process. Insofar as *Younger* is concerned, the passage of time here has only served to cast doubt on the

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adequacy, for these plaintiffs at least, of any remedy the Pennsylvania Supreme Court may find to be available in the Court of Common Pleas.[8] The situation remains the same for *Younger* purposes as it was at the time of the filing of the federal complaint; the plaintiffs are still doing nothing more than pursuing a parallel track and the relief that they have sought and received does not in any way interfere with the judicial process of the state. This is true even if one assumes, as we do solely for the purposes of this opinion, that the election contest in the Senate should be regarded as a judicial proceeding for *Younger* purposes The plaintiffs have asked only that Stinson be decertified and that Marks be certified by the Board. The certification of Marks would not preclude an

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[8]Since plaintiffs' evidence has not been heard by a state court, the appeal in the Supreme Court of Pennsylvania appears to offer plaintiffs only the hope of securing a ruling that the court of Common Pleas did have jurisdiction to hear their complaint. At the time the district court declined to abstain, the Supreme Court had not noted probable jurisdiction or set a briefing schedule. While it has since done so, the most that can be expected after the appeal is fully litigated is a pass back to square one -- the Court of Common Pleas and an evidentiary hearing in which their claims can be pursued.

election contest in the Senate, any more than the prior certification of Stinson precluded one.[9]

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We believe our observations in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1117 (3d Cir. 1986), are equally pertinent here:

> "In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings." *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 30 (6th Cir. 1984). In this case, on the other hand, the federal plaintiffs -- Kentucky West and Equitable Gas -- are also the state plaintiffs. Moreover, they are not seeking to enjoin any state judicial proceeding; instead, they simply desire to litigate what is admittedly a federal question in federal court, having agreed to dismiss their pending state appeal if the district court assumes jurisdiction over the merits of their complaint. . . .
>
> Under the circumstances, then, we believe that the balance of state and federal interests tips decidedly away from abstention

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[9]By so noting, we do not suggest that a federal court would be without power to enjoin an election contest in the Senate upon finding a violation of the Voting Rights Act or the Civil Rights Act, or that the Senate would not be required to give full faith and credit to a final district court judgment in this case. Those issues are not before us and we express no opinion thereon.

> under *Younger*. *New Jersey Educ. Ass'n*, 579 F.2d at 771-72. As a result, the district court abused its discretion when it dismissed the companies' complaint on this basis. To deny Kentucky West and Equitable Gas access to a federal forum simply because of their pending state appeal would be at odds with a fundamental premise of our federal judicial system: that is, "that where Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action." *Id.* at 769.

While the federal plaintiffs in our case have not, so far as we are aware, agreed to abandon their state proceedings if the district court grants them relief, that is not essential to the principle articulated in *Kentucky West Virginia Gas*. A federal plaintiff may pursue parallel actions in the state and federal courts so long as the plaintiff does not seek relief in

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the federal court that would interfere with the state judicial process. Moreover, since parallel proceedings always involve a likelihood that a final merits judgment in one will effectively terminate the other, it necessarily follows that the mere fact that a judgment in the federal suit might have collateral effects in the state proceeding is not interference for *Younger*.[10] *See*,

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[10]The defendants have not asserted final judgment of the Court of Common plaintiffs from going forward here on Civil Rights Act claims. *See* Wright, Miller & Cooper, FEDERAL PRACTICE § 4435 (a final judgment "on the merits" is a necessary predicate for claim and issue preclusion).

e.g., *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1200-1203 (3d Cir. 1992).

The district court did not err in refusing to abstain.[11]

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[11]The defendants also urge that the district court lacked jurisdiction under the *Rooker-Feldman* doctrine. The district court rejected this argument, finding that *Rooker-Feldman* did not bar it from hearing the fraud and constitutional claims of any of the parties involved. The Rooker-Feldman doctrine embodies the principles set forth by the Supreme Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, (1923): "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court determinations or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *Port Auth. PBA v. Port Auth. of N.Y. & N.J.*, 973 F.2d 169, 177 (3d Cir. 1992) (*citing Feldman*, 460 U.S. at 483 n.16). We agree with the district court that *Rooker-Feldman* principles are not applicable here.

First, *Rooker-Feldman* did not bar the district court from hearing the claims of the Latino plaintiffs because they were not parties to any of the state court proceedings on the matter. *Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992) ("[T]he *Rooker-Feldman* doctrine has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion . . .. The basic premise of preclusion is that non-

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parties to a prior action are not bound. A non-party is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene.").

Second, the court was not barred under *Rooker-Feldman* from hearing the constitutional and fraud claims of Marks and the Republican State Committee ("RSC") because these claims had not been determined by the state court, nor were they inextricably intertwined with a prior state court decision. Specifically, the court of common pleas dismissed Marks' and the RSC's claims without reaching the merits. Therefore, the district

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V.
REMEDY

Having concluded that the district court properly exercised its jurisdiction and that the record supports its findings on the probability of success and irreparable injury, we now turn to the remedy issue. The state elections process recognized Stinson as the winner of the election. While the district court found for purposes of plaintiffs' preliminary

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injunction motion that wrongdoing affected the election, it did not find, even for that limited purpose, that Stinson's election was attributable to wrongdoing. The district court did not find

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court was not faced with a situation where it was asked to review a determination of the state court. Furthermore, a "federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment." *Centifanti v. Nix*, 865 F.2d 1422, 1430 (3d Cir. 1989) (*quoting Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (concurring opinion)). Here, the district court could (and did) find that Marks' and the RSC's fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings. *Id.*

Finally, *Rooker-Feldman* did not bar the district court from hearing the claims of plaintiffs Steck and Lorenzo, the Election Contest petitioners. Because the court of common pleas did not reach the merits of their claims, the district court did not sit in review when it heard them. Nor are the claims of Steck and Lorenzo inextricably intertwined with the state court's decision to dismiss because the district court need not reverse this decision before granting Steck and Lorenzo federal relief.

that Stinson failed to receive a plurality of the legally cast votes.

On the other hand, contrary to plaintiffs' strenuously pressed argument,[12] we do not understand the district court to have concluded that Marks received a plurality of the legally cast ballots. Nor did the district court address the problem created by the fact that some electors who cast tainted absentee ballots undoubtedly would have cast valid votes at the polls had they not been misled (by a conspiracy knowingly supported by state actions) into believing there was a "new way to vote." Thus, while the district court concluded that "no evidence indicates that the machine returns do not reflect the will of the electorate," slip op. at 32, it did not affirmatively conclude that the winner of the machine vote would have won a plurality of the legal votes cast if the wrongdoing had not occurred.

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The district court did conclude, with ample record support, that the wrongdoing was substantial, that it could have affected the outcome of the election, and that it rendered the

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[12]At oral argument, plaintiffs insisted that the district court implicitly had found that Marks won a plurality of votes cast legally both at the polls and through absentee ballots. Central to plaintiffs' contention was the $685 that the Stinson campaign supposedly spent in furtherance of the absentee ballot fraud. *See* 10 App. 5186-98. Each dollar, say plaintiffs, represented one vote, and when 685 votes are subtracted from Stinson's total, Marks prevails. The district court, however, found that the money was spent soliciting both applications for absentee ballots *and* absentee ballots, with $1 being paid "per application *or* ballot." *Marks v. Stinson*, No. 93-6157 (E.D. Pa. Feb. 17, 1994), slip op. at 16 (emphasis added). No conclusion thus can be drawn about how many votes were obtained from the expending of $685.

certified vote count an unreliable indicator of the will of the electorate. Having so concluded for the purposes of the preliminary injunction motion, we cannot say that the district court abused its discretion in restraining Stinson from exercising the powers of the office *pendente lite*.

The integrity of the election process lies at the heart of any republic. The people, the ultimate source of governmental power, delegate to their elected representatives the authority to take measures which affect their welfare in a multitude of important ways. When a representative exercises that authority under circumstances where the electors have no assurance that he or she was the choice of the plurality of the electors, the legitimacy of the governmental actions taken is suspect. Accordingly, where there is substantial wrongdoing in an election, the effects of which are not capable of quantification but which render the apparent result an unreliable indicium of the will of the electorate, courts have frequently declined to allow the apparent winner to exercise the delegated power. *See, e.g., Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967). Having tentatively found the facts that it did, we cannot fault the district court for restraining Stinson from exercising the powers that are delegated to a senator by the people, even though the

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court was not able to find that he received less than a plurality of the legally cast votes.

However, the district court's tentative findings that there was "massive absentee ballot fraud, deception, intimidation, harassment and forgery," and that "many" of the absentee votes were tainted, do not, we conclude, justify its decision to order the certification of Marks. Marks' only claim of

authority to exercise the people's delegated power rests upon his receiving a majority of the votes cast on the voting machines. Equating the machine vote with the will of the electorate disenfranchises the voters who cast legal absentee ballots. Moreover, it fails to take into account the will of electors who would have voted at the polling places but who unknowingly cast illegal absentee ballots relying on the assurances that were an integral part of the scheme which "the Board participated in and later tried to conceal." Slip op. at 26.

In the circumstances which confronted the district court, we believe the same principle that justified the unseating of Stinson dictates that Marks not be certified on the basis of the machine vote only. For the actions of a democratically elected body of representatives to be legitimate, the electorate must be assured that each of the representatives was the choice of the electorate. It follows, we believe, that Marks should not be certified unless and until the district court is satisfied that Marks would have won the election but for the wrongdoing.

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As the Supreme Court has stated:

> Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S.

651, and to have their votes counted, *United States v. Mosley*, 238 U.S. 383.

Reynolds v. Sims, 377 U.S. 533, 554 (1963). These rights are potentially violated, however, whenever an individual is sworn in as an elected representative without a demonstration that he or she was the choice of a plurality of the electorate. This is so because the possibility is left open that a different candidate actually received the most votes, which would mean that each of the votes cast for that candidate were ignored.

Plaintiffs argue that to require certainty of results here would be unfair to Marks. They note that the district court tentatively found that the wrongdoing of Stinson and the other appellants may have made it impossible to determine who would have won a fair election. Assuming that it is in fact impossible to determine a certain winner, Marks will be forced to endure the hardship of running again if he still wishes to fill the senate seat. Therefore, plaintiffs argue that Marks will, in effect, be punished for the wrongdoing of the appellants. Plaintiffs suggest that the way to deal with election results that are uncertain as a result of fraud is to have the

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"punishment" fall on the party who perpetrated the fraud. Plaintiffs' arguments, however, miss the mark. Our primary concern here is not to punish any individual candidate or party, but to promote the public's interest in having legislative power exercised only by those to whom it has been legally delegated. This interest is not served by arbitrarily ignoring the absentee vote, a substantial but undetermined portion of which was either legally cast or came from voters who would have gone to the polls but for the fraud. Just punishment for any

wrongdoing that has been perpetrated may be pursued in other proceedings; it is not the objective here.

We find the decision of the Court of Appeals for the First Circuit in *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), instructive here. That case involved a primary election to select a Democratic candidate for a vacancy on the Providence City Council. Rhode Island law provided for absentee ballots in elections of municipal officers but was silent regarding their use in party primaries for municipal office candidates. The officials responsible for the election distributed absentee ballots, and all absentee ballots cast by qualified voters in the manner directed by the board of elections were counted in certifying the winner. In the ensuing litigation the Supreme Court of Rhode Island concluded that there was "no constitutional or statutory basis for allowing . . . absentee voters to cast their votes in a primary election." *Id.* at 1068. The court directed the decertification of the previously declared winner,

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and the board of canvassers certified a new winner based solely on the machine cast ballots.

A civil rights class action was commenced in federal court by the absentee voters alleging a violation of their right to vote secured by the federal Constitution. The district court found a constitutional violation and ordered a new election. The Court of Appeals affirmed, observing with respect to the constitutional violation:

> [W]hile . . . local election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures

> exist, there remain some cases where a federal role is appropriate. The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.
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> * * *
>
> The present situation, judged in light of the standards we have discussed, presented a due process violation for which relief under § 1983 was appropriate. The district court was not asked to examine the validity of individual ballots or to supervise the administrative details of a local election. It was asked to remedy a broad- gauged unfairness that infected the results of a local election.

Id. at 1077, 1078.

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The candidate who won the machine vote argued that the plaintiffs failed to establish that "enough of the disenfranchised absentee voters would have voted in person to have altered the result." *Id.* at 1079. The court rejected this argument and affirmed the order requiring an election, reasoning:

> Given the evidence of some voters -- including two who were severely handicapped that they would have voted in person, and the importance of the right to vote, the court could infer that it was more likely than not that a very significant proportion of those voting by absentee ballot would have gone to the polls had such ballots not been available. While the "outcome" test provides a sensible guideline for determining when federal judicial invalidation of an election might be warranted [*citations omitted*], it is not a principle requiring mathematical certainty. In cases of outrageous racial discrimination some courts have chosen not to apply it at all, but to invalidate the election simply for its lack of integrity. . . . Here, the closeness of the election was such that, given the retroactive invalidation of a potentially controlling number of the votes cast, a new primary was warranted.

Id. at 1080.

While Griffin, unlike this case, did not involve a "massive absentee ballot fraud," that distinction does not diminish its helpfulness here. Several points are worthy of note in the context of this case. First, the court concluded that rejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns. Second, the court's focus was not upon the alleged prejudice to a candidate who endured the rigors of electioneering and who may have been the choice of the

electorate, but rather upon the right of the electorate to vote and to have their votes counted. Finally, even in the absence of fraud, where it was not feasible to establish who would have won a properly conducted election, a new election was appropriate to restore the integrity of the electoral process.

We are mindful of the fact that our decision to sustain the preliminary injunction insofar as it relates to Stinson and to vacate it insofar as it relates to Marks will likely result in the voters of the second senatorial district being without representation in the Pennsylvania Senate during the pendency of this litigation. That prospect justifiably concerned the district court and was a primary reason for its ordering the certification of Marks. We think that concern justified the district court in expediting these proceedings and instructing the parties to prepare for an immediate trial on the merits. As we have noted, we do not think that concern justified the certification of a candidate who had not established his credentials.

Interim periods during which the voters of an area are without representation are inevitable. Vacancies periodically occur for a variety of reasons, and the process necessary to select someone to fill those vacancies necessarily takes time. Among the numerous factors that can make that period substantial are irregularities in the voting process and ensuing litigation. While substantial periods without representation are regrettable,

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the consequences of placing political power in unauthorized hands are of far graver concern.

We urge the district court to reach a final resolution of this case as soon as possible. The character and timing of further proceedings are, of course, left to its discretion. Those proceedings and the court's final judgment, however, should be consistent with this opinion. In particular, the district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing.[13] *See, e.g.*, *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986), *stay denied*, 479 U.S. 1301, *cert. denied*, 479 U.S. 1023 (1986).

If the district court finds a constitutional violation, it will have authority to order a special election, whether or not it is able to determine what the results would have been in the absence of that violation. The district court need not exercise this authority, however. Depending on the circumstances existing at the time these proceedings are concluded, a special election to fill the vacancy for the remainder of the year may not be justifiable in terms of the expense to the state and the burden on the candidates, voters, and election officials. The

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district court may exercise its own discretion in light of the circumstances then existing or it may simply invalidate the election, declare that there is a vacancy, and leave the deci

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[13]We do not suggest that such a finding would have to be made with mathematical precision. Courts, with the aid of expert testimony, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. *See e.g. Curry*, 802 F.2d at 1317–19. What is required is evidence and an analysis that demonstrate that the district court's remedy is worthy of the confidence of the electorate.

sions concerning a special election and the timing thereof to the appropriate state authorities.

VI.
CONCLUSION

We will vacate that portion of the district court's preliminary injunction that required the Board of Elections to certify Marks. The remainder of the preliminary injunction will remain in effect until further order of the district court.

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* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 94-1247 AND 94-1248

BRUCE MARKS; KATHY STECK,
ON BEHALF OF THE VOTERS OF THE SECOND DISTRICT;
EMANUEL LORENZO; LYDIA COLON; LILLIAN CRUZ;
DIANA IRIZARRY; RUTH MARTINEZ; ZORAIDA RODRIGUEZ; YESENIA VASQUEZ;
REPUBLICAN STATE COMMITTEE

v.

WILLIAM STINSON;
THE WILLIAM STINSON CAMPAIGN;
PHILADELPHIA COUNTY BOARD OF ELECTIONS;
MARGARET M. TARTAGLIONE; JOHN F. KANE;
ALEXANDER Z. TALMADGE, JR.
AND VARIOUS DOE AND ROE DEFENDANTS

SENATOR WILLIAM STINSON,
Appellant in No. 94-1247

PHILADELPHIA COUNTY BOARD OF ELECTIONS,
MARGARET M. TARTAGLIONE, JOHN F. KANE
AND ALEXANDER TALMADGE, JR.,
Appellants in No. 94-1248

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN,
MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN,
MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN
AND ROBERT W. LES,
Intervenors-Appellants, as per the Court on 3/9/94,
in Nos. 94-1247 and 1248

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL ACTION NO. 93-CV-06157)

BEFORE: STAPLETON, GREENBERG, and COWDEN,
Circuit Judges

ORDER AMENDING OPINION

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* * *

IT IS ORDERED that the slip opinion in the above case, filed March 16, 1994, is amended as follows:

1. Page 14: Substitute "absentee ballots" for the words "absent ballot" in the last sentence of the first full paragraph.

2. Page 27: Substitute "by state actors" for the phrase "by state actions" in the parenthetical clause of the first full paragraph.

3. Page 29: Delete in its entirety the last sentence of the only full paragraph and replace it with the following: "This is so because the possibility is left open that some other candidate actually received more votes than the declared winner, which would mean that each of the votes cast for this other candidate was ignored."

4. Pages 30–31: Delete the portion of the text of the bridge paragraph that precedes the quotation and replace it with the following:

> "A civil rights class action was commenced in federal court by the absentee voters alleging that the failure to count their ballots constituted a violation of the due process clause of the Fourteenth Amendment. The district court found such a violation, stressing that the plaintiffs had followed the instructions of the officials charged with running the election, and ordered a new election. The Court of Appeals affirmed, observing with respect to the constitutional violation:"

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5. Page 32: Add the following footnote 13 at the end of the initial clause of the first full paragraph:

> "13. *Griffin* is also distinguishable from this case because there has been no finding here that the voters who cast legally unauthorized absentee ballots were reasonable in believing they were proceeding in a legally authorized manner. While the district court's findings of fact make clear that two members of the Board knowingly aided Stinson's "new way to vote" program, there is no finding that those casting unauthorized absentee ballots relied on express or implied representations of election officials as occurred in *Griffin*. Nothing in *Griffin* suggests that a new election is required in all instances in which voters, reasonably or unreasonably, make a mistake about the place or manner in

which they are authorized to vote. Nor do we so suggest."

6. Page 32: Substitute "right of the electors to vote" for the phrase "right of the electorate to vote" in the penultimate sentence of the first full paragraph.

7. Page 33: Renumber footnote 13 as footnote 14.

By the Court,

/s/ Walter K. Stapelton
Circuit Judge

DATED: March 30, 1994

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 93–6157

BRUCE S. MARKS, et al.

v.

WILLIAM STINSON, et al.

Newcomer J. February 17, 1994

Presently before the court is plaintiffs' Motion for Preliminary Injunctive Relief. After a hearing in this matter on February 7–9, 1994, and after considering the arguments of counsel, the court makes the following Finding of Fact and Conclusions of Law.

I. FINDINGS OF FACT.

1. Plaintiffs are Bruce S. Marks, Kathy Steck Samuel Lorenzo, Lydia Colon, Lillian Cruz, Diana Irizarry, Ruth Martinez, Zoraida Rodriguez, Yesenia Vasquez, and the Republican State Committee.

2. Defendants are William Stinson the William Stinson Campaign, the Philadelphia County Board of Elections Margaret M. Tartaglione, John W. Kane, Alexander Z. Talmadge Jr., and various Doe and Roe defendants.

3. Republican Bruce Marks ("Marks") and Democrat William Stinson ("Stinson") were candidates for the

Pennsylvania State Senate in an election conducted on November 2, 1993 in the Second Senatorial District (the "District") The election was held to fill the remaining portion of a term which expires in December, 1994. The District consists of all or part of the 7th,

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18th, 19th, 20th 23rd, 33rd, 37th, 42nd, 49th, 53rd, 54th, 55th, 56th, 61st, and 62nd wards. See Plaintiffs' Exhibit 48. This election was particularly significant to both parties because control of the State Senate hung in the balance.

4. A significant portion of the District consists of African-American and Latino voters. Testimony of Voters.

5. According to the certified results of the Philadelphia City Commissioners ("the Board"), sitting as the County Board of Elections, candidate Marks won 19,691 votes and candidate Stinson won 19,127 votes on the voting machines on Election Day. *See* Official Certification, Plaintiffs' Exhibit 113.

6. According to the certified results of the Board, Marks won only 371 votes and Stinson won 1,396 votes from absentee ballots. *See* Official Certification, Plaintiffs' Exhibit 113.

7. Pennsylvania permits a qualified elector to vote by absentee ballot in the event that the elector is, inter alia, absent from the Commonwealth or county of residence "because his duties, occupation or business require him to be elsewhere during the entire period the polls are open" or is physically unable to go to the polls. 25 P.S. §3146.1(j) & (k).

8. An elector seeking to vote by absentee ballot must submit a proper absentee ballot application, including a statement that the elector expects to be out of the county on Election Day or that the elector is physically unable to go to

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the polls, with a declaration stating the nature of the disability and the name, address, and telephone number of the attending physician. 25 P.S. §3146.2(e)(1) & (2).

9. The application requires that the elector provide a "post office address to which ballot is to be mailed". 25 P.S. §3146.2(e)(1) & (2).

10. In Philadelphia County, the application has a mailing label on it for the address, which is removed and affixed to the Absentee Ballot Package when the application is approved. Testimony of Dennis Kelly.

11. Although the law requires the elector to provide the "reason for his absence", the application in use in Philadelphia County inexplicably does not require this provision, increasing the possibility of widespread abuse of absentee ballots. 25 P.S. §3146.2(e)(1); Plaintiffs' Exhibit 1.

12. In Philadelphia, the application is not available in a Spanish translation even though approximately twenty-five (25) percent of the District is Spanish speaking and absentee ballots and declarations are available in a Spanish translation. Testimony of Commissioner Talmadge; Plaintiffs' Exhibit 1-3.

13. Absentee ballot applications are processed by the Board, which is charged with overseeing elections, and,

which, in Philadelphia County, consists of the three County Commissioners, Democrat Chairman Margaret Tartaglione ("Tartaglione"), Democrat Alexander Talmadge, Jr., Esq. ("Talmadge"), and Republican John Kane ("Kane"). 25 P.S. § 3146.2b. Although the Board is

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controlled by one party, it has a statutory and constitutional obligation to conduct elections fairly and impartially.

14. The practice and procedure of the Board is to promptly time-stamp each application when it is received by the Board. (Testimony of Commissioner Talmadge and Dennis Kelly). The Board is required to process absentee ballot applications to determine if they meet the legal requirements and to notify an applicant immediately if an application is rejected. 25 P.S. §3146.2b.

15. The Board does not check the signatures on absentee ballot applications against the signatures on voter registration (binder) cards to prevent forgeries, even though Commissioner Talmadge asserts that it is official policy to do so. Testimony of Commissioner Talmadge and Dennis Kelly.

16. If the absentee ballot application meets the required criteria and is otherwise complete, the Ward, Division and Registration number (or Control number) is placed on the application by the Board. The Control number is the same number that appears on the voter registration or permanent binder card. Testimony of Dennis Kelly.

17. The Board is required to maintain all applications as public records for two years. 25 P.S. §§ 3146.2(i), 3146.9. The application states, as required by law, that "a

voter who receives an absentee ballot . . . and, who, on election day, is capable of voting at the appropriate polling place must void the

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absentee ballot and vote in the normal manner." 25 P.S. §3146.2(i); Plaintiffs' Exhibit 1.

18. The deadline for receipt of applications is 5:00 p.m. on the Tuesday before the election, which in the instant case was October 26, 1993. 25 P.S. §3146.2a.

19. After approving an absentee ballot application, the Board is to mail or deliver the corresponding absentee ballot package to the elector using the mailing label existent on the application. 25 P.S. § 3146.5. The absentee ballot package ("Absentee Ballot Package") consists of an outer envelope in which is enclosed a declaration envelope (the "Declaration" or "Declaration Envelope"), an inner envelope (the "Inner Envelope"), a ballot (the "Ballot"), and instructions. 25 P.S. §3146.6; Plaintiffs' Exhibit 3.

20. Pennsylvania law does not permit the Board to deliver an Absentee Ballot Package to any person other than the applicant elector, 25 P.S. §3146.5, and, upon receipt, an elector is to mark the Ballot "in secret." 25 P.S. §3146.6. After marking the Ballot, an elector is to seal it in the Inner Envelope, seal the Inner Envelope in the Declaration Envelope, and execute the declaration on the Declaration Envelope. Testimony of Dennis Kelly and Commissioner Talmadge.

21. The elector is then to "send by mail" or deliver "in person" the executed Declaration Package to the Board. 25 P.S. §3146.6. The deadline for receipt of absentee ballots is

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5:00 p.m. on the Friday before the Election, which in the instant case was October 29, 1993.

22. Ballots are then collected and distributed to polling places on Election Day. 25 P.S. §3146.8(a); Testimony of Dennis Kelly.

23. An absentee ballot cast by a voter who is in the county of residence and able to go to the polls on Election Day is void as a matter of law, and an absentee ballot voter has a duty to go to the polls and void the ballot in the event such voter is in the county and able to do so. 25 P.S. §3146.6b.

24. In the event an elector votes in person on Election Day, the Declaration is marked "void" and the absentee ballot is not counted. Testimony of Dennis Kelly.

25. At the close of the polls on Election Day, absentee ballots are canvassed by opening the Declaration Envelopes, removing, mixing, and then opening the sealed Inner Envelopes and then counting the ballots. This procedure is conducted to ensure the secrecy of the vote. 25 P.S. §3146.8.

26. Once the inner envelopes are mixed and opened, it is difficult, if not impossible, to match a ballot with a particular voter. Testimony of Dennis Kelly.

27. The overall absentee ballot process is designed to provide the same privileges and protections as if the absentee voter were to cast a ballot at the polls. Testimony of Commissioner Talmadge.

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28. If campaign and party workers who deliver applications to the Board are also given the corresponding Absentee Ballot Packages to deliver to voters, grave opportunity for misconduct is created, because there is little or no safeguard against forged applications and ballots. Such an abuse took place in the instant action. *See* Testimony of Commissioner Talmadge; Voter Testimony.

29. Providing Absentee Ballot Packages to campaign and party workers also creates an opportunity for other abuses, such as campaign workers directing completion of, or even completing the applications and ballots for voters. *See infra* FINDINGS OF FACT. This practice was routinely conducted by Stinson campaign workers. Testimony of Commissioner Talmadge; Testimony Ruth Birchett; Voter Testimony.

30. Democrats have controlled the County Board of Elections at least since 1971. Testimony of Dennis Kelly; Commissioner Talmadge.

31. The Board is under a statutory duty to strictly enforce the Election Code to avoid any partiality in the conduct of elections. Commissioner Talmadge, however, was unaware of the existence of certain statutory provisions and admitted that certain other provisions were not followed. Commissioner Talmadge and Dennis Kelly both testified that they knew of and even condoned certain Board activities of the

Commission that contradicted the Election Code. Testimony of Commissioner Talmadge; Dennis Kelly.

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elections, stated that Absentee Ballot Packages were being mailed to voters. It was not disclosed at the meeting that thousands of Absentee Ballot Packages were being delivered to Democrat committeepersons or Stinson campaign workers during the 1993 election. Plaintiffs' Exhibits 120, 121.

35. Commissioner Kane, the Republican City Commissioner, was not aware that other Commissioners permitted absentee ballots to be delivered to Democrat committeepersons or to Stinson campaign workers. *See* Testimony of Commissioner Kane.

36. Reba Morella was an employee of the Board. Her responsibilities consisted of processing absentee ballot applications and ballots during the two weeks prior to the election. She did not observe absentee ballots being delivered to Democrat committeepersons or to Stinson campaign workers during normal office hours. Rather, the standard operating procedure during normal office hours was to mail Absentee Ballot Packages only to the voter or to allow the voter's spouse to pick it up personally. Testimony of Reba Morella.

37. Commissioner Talmadge and Dennis Kelly, in violation of the Election Code, were secretly conducting activities relating to the Absentee Ballot Packages. Commissioner Tartaglione was aware of, and ratified, these activities. Most employees of the Board were not aware of the irregularities. Testimony of Commissioner Talmadge, Kelly and Morella.

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38. No witness, other than those involved in the malfeasance, was able to offer testimony that supported the existence of a practice allowing Absentee Ballot Packages to be delivered to any campaign or political workers for delivery to voters prior to, or during, the 1993 Election. *See* Testimony of Martz, Birchett, and Commissioner Talmadge.

39. Similarly, Peter Medina, a Democratic committeeperson who worked in various political divisions over the last 40 years, never saw Absentee Ballot Packages in the hands of any campaign worker prior to this election. Testimony of Peter Medina.

40. Stinson worker Josue Santiago came to Medina one or two days before the Election (which would be three days after the deadline for the return of absentee ballots to the Board) with a legal size box full of Absentee Ballot Packages that he was delivering throughout minority areas of the District. Santiago convinced Medina that the law had changed to permit Santiago to have in his possession the Absentee Ballot Packages. Medina had never heard of such a procedure before Santiago communicated it to him. Testimony of Peter Medina.

41. The Board, through the conduct of Commissioners Tartaglione and Talmadge, Dennis Kelly, and their agents, engaged in a covert process which assisted the Stinson Campaign by delivering, and/or knowingly allowing the delivery of, hundreds of Absentee Ballot Packages directly to the Stinson Campaign and other Stinson supporters, rather than mailing or delivering them

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to voters. *See* Testimony of Ruth Birchett, Dennis Kelly, and Commissioners Talmadge and Kane.

42. The campaign entity organized under Pennsylvania law for the Stinson Campaign was registered as the "Committee to Elect Bill Stinson". Joseph Martz served as the campaign manager and was paid through Rendell '91, a political action committee associated with Democrat Mayor Ed Rendell. Plaintiffs' Exhibit 11; Testimony of Joseph Martz.

43. Frank Felice ("Felice") served as the treasurer for the Stinson Campaign. Testimony of Martz and Jones.

44. During July, August, and September, 1993, Stinson canvassed predominately Caucasian areas of the district with Craig Cummons, Frank Felice, William Jones, and others. During the canvassing, the canvassers solicited absentee ballot applications from individuals, including persons registering to vote for the first time, pursuant to a plan to obtain 20 absentee ballots from each division. Testimony of Jones; Stinson Deposition, at p. 114; Plaintiffs' Exhibit 113.

45. Many persons who were hesitant to register because they simply did not want to go to the polls were told that they could fill out an absentee ballot application and obtain an absentee ballot out of convenience. Many applications were received based on this misrepresentation. Testimony of Jones.

46. Many of the applications listed the basis for voting absentee as being out of the county when it was clear that in July, August, or September that the voter had no basis to

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believe that he or she would be out of the county on Election Day. Testimony of Jones; Voter Testimony.

47. Candidate Stinson and his campaign workers instructed the canvassers not to fill in the date on the absentee ballot applications in order to conceal that the applications had been solicited many months prior to Election Day. Testimony of Jones.

48. Numerous absentee ballot applications solicited with Stinson's personal involvement were obtained in violation of the Election Code. Testimony of Jones.

49. The Stinson Campaign also used a strategy whereby workers would tell people they could vote from home, even though many such people were unemployed and were not going to be out of the county. There was simply no attempt to establish that any of the people were going to be out of the county. The "out of the county" exception was the easiest exception because it was virtually impossible to verify. Testimony of Jones.

50. After working in the field for a few weeks, Jones was assigned to review applications after canvassing each evening and to complete, when appropriate, necessary information for submission to the Board. Jones became concerned that the applications were being obtained in an illegal manner. Testimony of Jones.

51. Jones approached Stinson and complained that there was improper conduct taking place in reference to the ballot applications. Stinson advised him to try and have the

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applications corrected and to give them back to solicitors Cummings and Campaign Treasurer Felice to see if the applications could be corrected. Jones carried out Stinson's

instructions, but the same type of problems continued. Testimony of Jones.

52. After he realized that the situation had not been corrected, Jones again approached Stinson and informed Stinson that the applications were still being obtained in an improper manner. Stinson directed Jones to use his best judgment and if fifty (50) percent of it looked correct, then he was satisfied. Testimony of Jones.

53. Stinson told Jones that he was never going to lose another election because of the absentee ballots. Stinson then admonished Jones for placing the dates on applications instead of leaving the date blank. Testimony of Jones.

54. Jones raised questions with Frank Felice and others as to the absentee ballots and applications, and Jones was assured that it would not be relevant because Stinson was going to win by such a large margin. Testimony of Jones.

55. After these discussions with Stinson and other campaign workers, Jones became increasingly concerned about the absentee ballot problem and was worried that if he submitted the absentee ballot applications to the Board, he would be the "fall guy" in the event this information became public. In light of this, Jones resigned. Testimony of Jones.

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56. Jones was considered to be a good worker by Stinson, who stated he had no problems with Jones' performance. Stinson Deposition, at p. 101.

57. Stinson stated at deposition that the applications in the white areas were submitted directly to Commissioner

Tartaglione's office and corresponding Absentee Ballot Packages were returned directly to the Stinson Campaign. Stinson Deposition, at p. 101.

58. The Absentee Ballot abuse was further developed by committeepersons in the District. For example, Fani Papanikalau, a Democrat committeewoman, obtained several illegal absentee ballots in the 42nd ward, 6th division. Adverse inference from Papanikalau Fifth Amendment testimony.

59. In addition, Absentee Ballots were forged in this division. Testimony of Pedro Figueroa.

60. Barbara Landers, a Democrat committeeperson, obtained several illegal absentee ballots in the 43rd ward, 19th division. Adverse inference from Landers Fifth Amendment Testimony.

61. Voters were mislead into improperly voting by absentee ballots in this division. Testimony of Voters.

62. Anthony Rotondo, a Democrat committeeperson obtained several illegal absentee ballots in the 43rd ward, 18th division. Adverse inference from Rotondo Fifth Amendment testimony. In addition, Absentee Ballot Packages were provided

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directly to Democrat Committeepersons throughout the District. Testimony of Dennis Kelly.

63. Approximately three weeks before the Election, Jones received a phone call from Marge Summers, a worker for the Stinson Campaign. Summers told him that a new

internal poll from the Democratic State Committee was published to show that William Stinson was four (4) percent behind Bruce Marks. Testimony of Jones.

64. At that time, Summers disclosed to Jones that the Stinson Campaign was going to saturate the Hispanic areas with applications and that the saturation was going to use the same scheme that was employed earlier. The "joke" at the campaign was that the Hispanics would sign anything. Testimony of Jones.

65. In response to the poll, the Stinson Campaign began an effort to convince Latino and African-American voters to cast absentee ballots using, *inter alia*, "Out of County" as the excuse for absentee voting. Testimony of Voters; Jones; and Adverse inference from Ascencio, Landers, Pratt, and Santiago Fifth Amendment Testimony.

66. Ruth Birchett served as the campaign director for the African-American and Latino areas. (Testimony of Birchett and Martz). Josue Santiago ("Santiago") was responsible for overseeing the absentee ballot program in the Latino areas. He was hired directly by Stinson, and reported to Stinson. Testimony of Birchett and Martz.

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67. Sultan Mateen ("Mateen") was responsible for overseeing the absentee ballot program in the African-American areas. Angel Ascencio ("Ascencio") was a worker on the Latino Team who solicited absentee ballot applications and ballots. Testimony of Birchett; Adverse Inference, Ascencio Fifth Amendment Testimony.

68. Ramon Pratt ("Pratt") was a Latino Team worker who solicited absentee ballot applications and ballots. Adverse Inference Pratt Fifth Amendment Testimony; Birchett Receipts.

69. Peter Medina, a Democrat Committeeperson, assisted Santiago as part of the Latino Team. Testimony of Medina.

70. Several other persons were identified by voters as Stinson supporters who conducted the same absentee ballot procedure. Testimony of Voters.

71. The absentee application and ballot scheme consisted of deceiving Latino and African-American voters into believing that the law had changed and that there was a "new way to vote" from the convenience of one's home. Testimony of Voters; Adverse inference from Fifth Amendment testimony of Santiago, Pratt, and Ascencio.

72. One part of the scheme involved paying field workers $1.00 per application or ballot obtained. (Testimony of Martz and Birchett, and Adverse Inference from Fifth Amendment testimony of Santiago, Pratt, and Ascencio). Ruth Birchett testified that at least $500 to $700 was dispensed in this effort to obtain such amount of votes.

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73. The scheme was also implemented through the use of phone bank scripts in English and Spanish which informed voters that they could elect Bill Stinson by voting from home. Plaintiffs' Exhibit 8. The English translation of the Spanish script could reasonably lead a person to believe

that there vas a new way to vote. *Id.*; Testimony of Martz and Birchett.

74. The Stinson Campaign obtained approximately 1,000 absentee ballot applications from the minority areas of the district. Almost 400 absentee ballot applications were submitted to the Board for approval by the Stinson Campaign for unregistered voters from minority areas. Plaintiffs' Exhibit 90.

75. Most of the Rejected Applications used "Out of County" as an excuse for an absentee ballot. *See* Rejected Applications.

76. At least $4,000 was specially allocated to implement this scheme from a political action committee associated with Democrat State Senator Vincent Fumo. Testimony of Martz and Birchett.

77. The scheme was further executed by having Birchett and others under her direction and control submit applications to the Board through Commissioner Talmadge's office by hand delivery. Testimony of Birchett.

78. The applications were delivered to Commissioner Talmadge's office in order for Commissioner Talmadge to provide Absentee Ballot Packages in return to the Stinson Campaign. Testimony of Birchett and Commissioner Talmadge.

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79. Prior to his contact with Ruth Birchett in her capacity as a Stinson worker, Commissioner Talmadge was aware that she worked for Stinson, and she had worked on

Talmadge's campaign in 1991. Testimony of Commissioner Talmadge.

80. Even though he has a duty to know and understand the Election Code and stated that he was aware of most of the absentee voting requirements, Commissioner Talmadge approved the absentee ballot procedure even though the procedure involved providing official absentee ballot materials and the ballot declarations to campaign workers. Testimony of Commissioner Talmadge.

81. Ruth Birchett even questioned both Candidate Stinson and Commissioner Talmadge as to the propriety of this scheme. She was assured that it was proper. Testimony of Birchett and Commissioner Talmadge.

82. Delivery of Absentee Ballots Packages to the Stinson Campaign workers was not initially disclosed to Commissioner Kane nor on the public record of the meetings held by the County Commissioners on October 20 and 27, 1993. Such meetings only disclosed the incorrect information that the Absentee Ballot Package were being returned to the voters by mail. Plaintiffs' Exhibits 120 and 121.

83. The Board's delivery of absentee Ballot Packages to the Stinson Campaign was designed to aid the Stinson Campaign in obtaining more votes through personal contact between the

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voter and the Stinson Campaign workers, and was a discriminatory practice which favored one candidate and party over another.

84. Based on this scheme, whereby the Stinson campaign retained custody of the Absentee Ballot Packages from the Board to the voter and back again, a sampling of over 30 voters testified that in numerous instances Stinson workers were executing applications, ballots, and/or declarations without the voter understanding the nature of the document. In addition, there was significant testimony indicating Stinson workers exerted improper influence over voters in the voters' homes. For example, Stinson workers would either instruct the voter to check certain places on the ballot, or in some instances, the workers even filled out the ballots for certain voters and even forged other ballots. Testimony of Voters.

85. Voters also completed applications and Declaration packages after the statutory deadline for receipt by the Board and such ballots were counted by the Board. Testimony of Medina and Voters.

86. Peter Medina obtained Absentee Ballot Packages from voters on November 1, three days after the statutory deadline. Medina acknowledged that on approaching the voters with their ballots, most of the voters did not even know that they had signed absentee ballot applications. Testimony of Medina.

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87. The testimony of the voters is credible, especially given the Board's undisputed failure to properly timestamp official documents such as the Rejected Applications.

88. Some voters testified that they do not want their own illegal votes to count in light of the manner in which their

votes were obtained. Some voters testified that they voted as they would have voted had they gone to the polls. Testimony of Voters.

89. The Stinson Campaign and Stinson workers conducted a widespread and deliberate scheme throughout the Latino and African-American areas to knowingly misrepresent election procedures and illegally obtain absentee votes. This scheme was known to at least two members of the Board and was known and ratified by Candidate Stinson. Testimony of Jones, Medina, Commissioner Talmadge; Adverse inference from Fifth Amendment testimony of Santiago, Ascencio, Landers, and Pratt.

90. Approximately 400 applications were rejected by the Board as being "not in binder" and/or "not in system", in other words, unregistered persons (the "Rejected Applications"). Plaintiffs' Exhibit 90. One application was filed by Stinson Worker Sultan Mateen. Only sixty of these original applications bore the stamp of the Board's office.

91. The Rejected Applications were delivered from the Delaware Avenue and Spring Garden Street office, where they were being processed, to the custody of Dennis Kelly who would return them to Commissioner Talmadge who in turn delivered them to Ruth

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Birchett. No record of the Rejected Applications was kept. Testimony of Dennis Kelly.

92. No notification was given to the persons submitted the Rejected Applications that such applications were rejected, nor was notice provided to applicants regarding

the reasons why their applications were rejected. In light of the returned applications, Dennis Kelly's inaccurate reports at the Board's meetings, the secret dealings between the Board and Stinson Campaign workers, and other testimony, several people were trying to conceal the absentee ballot solicitation scheme of the Stinson Campaign. Testimony of Kelly, Jones, and Commissioner Talmadge.

93. The original Rejected Applications were delivered to Commissioner Talmadge for return delivery back to Ruth Birchett within a week prior to the Election. This was inconsistent with Dennis Kelly's prior testimony at a deposition on January 25, 1994. Testimony of Dennis Kelly.

94. Kelly did not disclose this information to the Pennsylvania Attorney General's office when questioned about the procedures. Testimony of Dennis Kelly.

95. Martz advised Ruth Birchett to discard the Rejected Applications. This is further evidence that the Stinson campaign knew of the improper absentee ballot activities and later tried to conceal it.

96. Commissioner Talmadge knew about the Rejected Applications, facilitated the distribution of hundreds of

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Applications to Stinson Campaign workers, intentionally failed to enforce the Election Code, and later attempted to conceal this activity. Testimony of Commissioner Talmadge, Birchett, and Kelly.

97. Despite hundreds of applications being returned to the Board, no one made any effort to investigate this

conduct even though one returned application could stimulate such an inquiry. Testimony of Commissioner Talmadge and Kelly.

98. The practice of returning absentee ballot applications to a party or candidate was done outside the normal course of the Board.

THE IMPROPER CERTIFICATION

99. On November 18, 1993, the Board certified Candidate Stinson as the winner of the election from the Second Senatorial District. However, this was done during the course of a public hearing prior to concluding the Board's findings of fact and conclusions of law. The decision to certify Stinson was made on November 18, 1993 when all other candidates for Election in the County of Philadelphia were certified on November 22, 1993. Testimony of Commissioner Talmadge.

100. The Board certified Stinson during the hearing even though Commissioner Talmadge knew that the Election Code provided two days to appeal a decision of the Board with respect to challenges and even though he knew Marks was going to appeal. Marks did appeal. 25 P.S. §3146.8(e) requires the County Board to suspend any action in canvassing, computing, and certifying

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the winner pending the 48 hour period during which Marks had a right to appeal the City Commissioners' decision and 25 P.S. §3157 requires the Board to suspend certification pending such appeal.

101. The actions of the Board were designed to, and did in fact, prevent any realistic opportunity to appeal the certification in the State court system. The Board applied the Election Code in a discriminatory manner designed to favor one candidate. Certifying Stinson in this manner would end inquiries into the election abuse in which Commissioners Tartaglione and Talmadge participated. The Board conducted nothing more than mock hearings and intentionally reached decisions that would not reveal their involvement in the ongoing absentee ballot voting scheme. Defendants alleged plaintiffs consistently failed to avail themselves of the proper appeal procedures. Plaintiffs were never given the opportunity to present their claims because the safeguards failed at every level. Commissioner Talmadge readily admitted that if the Board would have properly performed its function even in light of the conduct of the Stinson campaign, that the absentee ballot scheme would not have tainted the election in such an invidious manner.

The appeal and challenge structure is grounded in the is fair and not rudimental supposition that the process inherently flawed. The Stinson Campaign activities relating to the absentee ballots were improper. Nonetheless, this abuse should have been corrected by the Board. The improper actions of

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the Board deprived the Plaintiffs from ever having their claims heard. Based on the Board's decision with reference to the challenges, the Board deprived the Court of Common Pleas of jurisdiction to consider plaintiffs' substantive claims. In short, the Board participated in an improper scheme and were then called upon to sit in judgment of that we conduct.

II. CONCLUSIONS OF LAW.

1. Plaintiffs have standing to bring claims regarding violations of the Civil Rights Act, 42 U.S.C. §1983 and the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (candidate); *Harman v. Forssenius*, 380 U.S. 528 (1965) (voter); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (political party).

2. This Court has jurisdiction pursuant to the Civil Rights Act and the Voting Rights Act.

3. Federal Rule of Civil Procedure 65 requires that notice be given to adverse parties. During closing arguments on February 9, 1994, counsel for the Board argued that the Board did not have notice of the hearing nor that injunctive relief was being considered against his clients. In their pleadings, plaintiffs set forth specific injunctive relief sought against each of the defendants parties were made aware of the scope of discovery and this was tailored to the injunctive relief sought against the defendants.

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In addition, counsel for the Board was present at the entirety of the proceedings, participated in discovery, and cross-examined and called witnesses at the hearing.

4. STANDARD FOR A PRELIMINARY INJUNCTION:

When ruling on a motion for preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65, a district court must consider four factors: (1) the likelihood that the movant will prevail on the merits at a final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the

conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. *S & R Corporation v. Jiffy Lube International, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992). All four factors should favor preliminary relief before the injunction will issue. *Id.* Moreover, the grant of injunctive relief is an "extraordinary remedy which should be granted only in limited circumstances." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989). Additionally, the courts have consistently recognized that this extraordinary remedy is only available where the party seeking injunctive relief has no adequate remedy at law. *Franks GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 n.3 (3d Cir. 1985); *see also Justin Industries v. Choctaw Securities, L.P.*, 847 F. Supp. 1218, 1220 (N.D. Tex.1990).

The court agrees with defendants to the extent that an injunction in this type of case is appropriate only in the most

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unusual circumstances. Under most circumstances, it is desirable to allow the legislative body to function without a federal court interfering into the state's legislative and political processes. In determining whether a preliminary injunction should issue, the criteria are to be applied, and in addition, the court must exercise judgment sensitive to all the interests likely to be affected by an injunction and the suitability of the underlying controversy to judicial resolution. *See, e.g., Garcia v. Romero-Barcelo*, 671 F.2d 1, 5 (1st Cir. 1982). In essence, a district court must engage in a balancing of harms, and in a case such as this, plaintiffs have an up-hill battle in demonstrating that they have met their burden.

A. LIKELIHOOD OF PREVAILING ON THE MERITS:

The first requirement that the movant must meet before an injunction will issue is the reasonable probability of eventual success in the litigation. *Instant Air Freight Co.*, 882 F.2d at 800. In the instant case, plaintiffs have set forth substantial evidence supporting each of their claims. Substantial evidence was presented establishing massive absentee ballot fraud, deception, intimidation, harassment, and forgery. Candidate Stinson knew of and ratified the procedures, and the Board participated in and later tried to conceal its involvement in the scheme. This is supported by the plaintiffs' exhibits such as the returned absentee ballot applications, the phone bank scripts, and the direct testimony of Jones, Kelly, and Commissioner Talmadge.

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The conduct of the Stinson Campaign and Board, through the conduct of Commissioner Tartaglione and Talmadge and their agents goes well beyond a "garden variety" election dispute and attacks the very integrity of the electoral process itself. Plaintiffs have established a likelihood of success on their claims that such activity violates:

i. the First Amendment rights of Plaintiffs by illegally discriminating in favor of Democrat Stinson over Republican Marks. *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977). *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-176, 97 S.Ct. 421, 426, 50 L.Ed.2d 376 (1976); *Shakman v. Democratic Organization Of Cook County,* 481 F.Supp. 1315, 1332-1334 (N.D. III. 1979), *judgment vacated on other grounds*, 829 F.2d 1387 (7th Cir. 1987).

ii. the equal protection rights of Plaintiffs by illegally discriminating in favor of Democrat Stinson over Republican Marks with no rational reason or purpose. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991);

iii. the substantive due process right of Plaintiffs to a free and fair election. *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964); *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982);

iv. the Voting Rights Act by applying a "standard, practice or procedure different from the standards, practices, or procedures" in a discriminatory fashion in favor of presumed supporters of Democrat Stinson over presumed supporters of Republican Marks in the delivery of Absentee Ballot Packages. *Brier v. Luger*, 351 F. Supp. 313 (M.D. Pa. 1972).

In addition, plaintiffs have demonstrated the likelihood of success on their claims in that the Stinson Campaign and Democrat party workers, in conjunction with the Board, conspired to violate the Election Code and Voting Rights Act by targeting Latino and African-American voters for fraud, intimidation, and deception in order to obtain illegal absentee ballots for Stinson.

This Court is entitled to take an adverse inference when appropriate in a civil case from the Fifth Amendment testimony of various witnesses. *See Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271 (3d Cir. 1986). However, even without any adverse inferences from the witnesses who

invoked their rights under the Fifth Amendment, plaintiffs have still met their burden of demonstrating a likelihood of success on the merits.

B. IRREPARABLE HARM

The second criteria a movant must establish before an injunction will issue is proof of irreparable harm. In order to

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demonstrate irreparable harm, "the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co.*, 882 F.2d at 801. Furthermore, the request for monetary relief has not been considered to constitute irreparable harm for the purposes of a preliminary injunction. *See id.* The Supreme Court, in determining the applicability of monetary relief to the grant of a preliminary injunction, has stated:

> [t]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murry, 415 U.S. 61, 90 (1964) (quoted in *Instant Air Freight Co.*, 882 F.2d at 801). Thus, it is evident that the harm "must be of a peculiar nature, so that compensation in money cannot atone for it." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3d Cir. 1988).

In the present case, plaintiffs have set forth substantial evidence demonstrating that they will suffer irreparable harm. An improperly seated state representative and the loss of constitutional freedoms constitutes irreparable harm. *See Elrod v. Burns,* 427 U.S. 347 (1976). The plaintiffs have alleged more than mere monetary harm, and even more importantly, plaintiffs set forth substantial evidence demonstrating that the

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absentee ballot scheme was a widespread effort to improperly obtain absentee ballots. Plaintiffs have not been subjected to this type of scheme for an extended period and simply decided to bring a claim at this juncture. Plaintiffs have repeatedly tried to have their claims heard, but due to the failure of the Board to consider their claims, plaintiffs have been foreclosed from receiving any relief. A racially discriminatory strategy was conducted by the defendants by actively misrepresenting and abusing the use and vote by minority Latino, Afro-American, elderly and other absentee ballot voters. In essence, defendants carried out an improper scheme to favor one candidate. Money alone cannot address these claims and time is of the essence. *Cf. Cintron-Garcia v. Romero Barcel,* 671 F.2d 1, 3-4 (1st Cir. 1982) (where challenged practices have been openly in existence for years prior to challenge, injunctive relief is inappropriate).

Plaintiffs, and even the entire state, suffer irreparable harm when a state representative is not properly elected. *See, e.g., Bell v. Southwell,* 376 F.2d 659 (5th Cir. 1969). This is ordinarily a matter within the sound discretion of the state, but in exceptional cases involving massive improper conduct, plaintiffs should be allowed to have their claims heard and an injunction issue if substantial evidence supports their claims.

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C. THE EXTENT TO WHICH THE DEFENDANTS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS ISSUED.

The irreparable harm suffered by the plaintiff exceeds any injury that may result to the defendants. With regards to the Board, it is their duty to ensure that elections are proper the fair. If an injunction is tailored to promote this end, the Board would not suffer any harm.

D. THE PUBLIC INTEREST

The public interest is served when courts enforce free and fair elections. *See Reynolds v. Sims,* 377 U.S. 533 (1964). While it is true that the State of Pennsylvania has a great interest in the outcome of its elections and should be able to resolve disputes without federal court intervention, the public interest is served in the extraordinary case, as here, when massive improper conduct has taken place by private and public workers. The public interest is served when the integrity of the election process is upheld and when adequate remedial measures are afforded complainants.

5. Federal courts in shaping equity decrees are "vested with broad discretionary power," *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Donohue v. Bd. of Elections,* 435 F. Supp. 957 (S.D. N.Y. 1976), and have exercised their powers in enjoining persons from taking office and voiding elections. *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1969) (election invalidated and candidate enjoined from office); *Ury v. Santee*, 303 F. Supp. 119 (N.D. III. 1969) (municipal election invalidated

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on due process and equal protection grounds and candidates enjoined from office).

6. In light of the massive scheme of Candidate Stinson and the Stinson Campaign, and in light of the failure of the Board to fairly conduct its duties, it would be grossly inequitable to allow Stinson to remain in office and for the Board to continue to conduct business as it did during the 1993 Election. In a similar circumstance, where a federal court addressed massive improper conduct on the part of a candidate, relief was granted which resulted in the certification of the candidate receiving the greatest number of legal votes without the requirement of a vote by vote canvass. *Curry v. Baker,* 802 F.2d 1302, 1312-14 (11th Cir. 1986) (in circumstances of "massive violations of state and federal law" there is no requirement to "use only mathematically precise voter-by-voter testimony to determine which candidate received the most legal votes cast . . . . Under this standard, massive voting irregularities could never be effectively redressed; it would put a premium on wrongdoing of enormous proportions").

7. The votes cast at the voting machines were not affected by the improper conduct of the Stinson Campaign or the Board, and no evidence indicates that the machine returns do not reflect the will of the electorate. The District should not be denied representation in the State Senate based on the efforts taken by the Stinson Campaign and the Board to conceal certain conduct relating to the absentee balloting procedures.

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8. The will of the electorate is reflected in the votes cast on the voting machines. The public interest will be

served by having Marks, the candidate who prevailed on the undisputed legal votes, serve the remaining months of the term, which expires in December, 1994, rather than declaring the seat vacant and scheduling a new election at the May primary. It would be inequitable to cause the Second Senatorial District to be without representation in the State Senate pending the outcome of a new election, especially in light of the fact that those voters in the District who exercised their vote legally have voiced their desire to have Marks serve as their State Senator. Another consideration in the balancing of equities in this case, though certainly not a binding one standing alone, is the cost that a new election would impose on the taxpayers of Philadelphia due to the fraud perpetrated by the City Commissioners.

Because time is of the essence, because it would be inequitable to order a new election, and because the Board acted improperly in administering the last election, the court will order that the election be recertified on the results of the ballots cast at the polls. *Id.* This is extraordinary relief; however, it is appropriate because extraordinary conduct by the Stinson Campaign and the Board tainted the entirety of the absentee ballots.

9. Injunctive relief is also inappropriate against the Board to ensure that voters understand the application procedures (in their native language when appropriate) and that the Board's

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procedures are followed so that constitutional and other rights are not violated. Proper respect is due to state proceedings. Only in the most unusual circumstances should a federal court intervene in an area that is so traditionally state controlled. *See generally Gruenburg v. Kavanagh*, 413 F. Supp. 1132

(E.D. Mich. 1976). Because the plaintiffs were unable to have their claims heard and because of the most unusual circumstances and the significant federal rights involved, this court has heard plaintiffs' claims and will tailor specific injunctive relief.

An appropriate Order follows.

Clarence C. Newcomer, J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 93-6157

BRUCE S. MARKS, et al.

v.

WILLIAM STINSON, et al.

ORDER

AND NOW, this 17th day of February, 1994, upon consideration of plaintiffs' Motion for Preliminary Injunctive Relief, and the response thereto, and after a hearing in this matter, and consistent with the foregoing Memorandum Opinion, it is hereby ORDERED that said motion is GRANTED as follows:

1. The Certification that Defendant William Stinson had more votes than Bruce Marks issued on November 18, 1993 by the County Board of Commissioners acting as the Board of Elections is VOID, as contrary to law.

2. Defendant William Stinson is hereby ENJOINED from acting in any capacity to vote, perform any duties or otherwise act or hold himself out as the duly elected Senator from the Second Senatorial District of Philadelphia, Pennsylvania.

3. The County Board of Commissioners acting as the Board of Elections is hereby ORDERED to recertify the results of the Second Senatorial District election based on the votes cast on the voting machines ONLY within seventy-two (72) hours of the date of this Order, and transmit such recertification to the Secretary of the Commonwealth as required by law.

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4. All absentee ballots, applications and materials by the Defendant, the County Board of Commissioners, issued acting as the Board of Elections, from this point forward shall be distributed, at least in the Second Senatorial District, in the English language and in the Spanish language.

5. The County Board of Commissioners acting in the capacity of the Board of Elections, their agents, servants and representatives and those acting in concert with them are hereby ENJOINED from distributing official absentee ballot material to any candidate or representatives of any candidate in connection with any election in a discriminatory manner. The official absentee ballot material, which is distributed from the County Board of Elections for use in primary or general elections after the receipt of a duly qualified absentee voter applications processed pursuant to the Election Code 25 P.S. §3146.2b, shall only be distributed by mailing same to the voter, or by hand delivery to the voter, pursuant to 25 P.S. §3146.5.

6. The defendant, Board of Commissioners, acting in the capacity of the County Board of Elections, their agents, servants and those acting in concert with them are hereby further ENJOINED from receiving any official absentee ballot materials or declarations from any candidate or its workers, or by anyone other than the voter. The Board of Commissioners shall only accept such ballots if delivered to them in person by

the voter, or mailed to them by the voter, pursuant to 25 P.S. § 3146.6.

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7. The County Board of Commissioners, acting as the Board of Elections shall maintain all official absentee ballot applications and all other absentee ballot materials in their possession for public access, and shall not deliver or return such records to any agent or other representative of any political party or candidate pursuant to 25 P.S. §3146.9.

8. The defendant County Board of Commissioners, acting as the Board of Elections, shall not employ discriminatory practices which involve applying the Election Code or any other law in a manner that favors or disfavors a candidate.

9. The County Board of Commissioners, acting Board of Elections, their agents, representatives and those acting in concert with them are further ordered to take all steps necessary within their department and within the office of the County Board of Elections to enforce the terms of this Order and to comply with the terms of the Election Code and other laws.

10. A trial in this matter will be scheduled by further Order of this court.

AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, J.

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ARTICLE III – THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U. S. CONST. art. III.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1979).

§ 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. § 1988 (1993).

§ 1971. Voting rights

(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions

(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall--

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to Title III of the Civil Rights Act of 1960 [42 U.S.C.A. s 1974 et seq.]: Provided, however, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection--

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates

or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) Jurisdiction; exhaustion of other remedies

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions

In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote. Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote

shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court. An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote.

Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court. Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may

fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee. The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified. Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States. Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: Provided, however, That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its

discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court. When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section; and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) of this section in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

(f) Contempt; assignment of counsel; witnesses

Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof

that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

(g) Three-judge district court: hearing, determination, expedition of action, review by Supreme Court; single-judge district court: hearing, determination, expedition of action

In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (c) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case. It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

42 U.S.C. § 1971 (1965).

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 94-814

In The
Supreme Court of the United States
October Term, 1994

IDA DOUGHERTY, et al.

Petitioners,

v.

BRUCE S. MARKS, et al.

and

WILLIAM STINSON, et al.

Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals For
The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a federal court finds that the majority members of a city's election board conspired with a candidate of their political party to defeat the other party's candidate through a pervasive scheme of fraudulently and illegally obtaining absentee ballots, in violation of constitutional and statutory rights, does the federal court have the discretion in equity to order the certification of the other candidate as the winner of the election, if it finds, based on a combination of voting machine results, survey data and statistical methods, that the other candidate would have been declared the winner but for the wrongdoing?

2. Is a case moot which raises the issue of whether a federal court may order the certification of the winner of a state election as a remedy for pervasive official fraud, when the state legislature in subsequent proceedings also seated the same candidate, the brief term of the certified winner has ended and the facts of the case are unlikely to be repeated or to escape future review?

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No. 94-814

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

IDA DOUGHERTY, et al.

Petitioners,

v.

BRUCE S. MARKS, et al.

and

WILLIAM STINSON, et al.

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

Respondents Bruce S. Marks, Kathy Steck, Manuel Lorenzo, Lydia Colon, Lillian Cruz, Diana Irizarry, Ruth Martinez, Zorida Rodriguez, Yesenia Vasquez and the Republican State Committee respectfully request this Court deny the petition for writ of certiorari seeking review of the Third Circuit's decision in this case.

STATEMENT OF THE CASE

Republican Bruce S. Marks and Democrat William Stinson ran in a special election, conducted on November 2, 1993, to represent Pennsylvania's Second Senatorial District. This election was held to fill the remainder of a term expiring November 30, 1993. According to the certified results of the Philadelphia County Board of Elections ("Board"), of the 38,818 votes cast on the voting machines on election day, 19,691 were cast for Marks, while 19,127 were cast for Stinson. Of the 1,767 absentee ballots cast, Marks received only 371 votes, while Stinson received 1,396 votes. When all votes were added, Stinson won by a final count of 20,523 to 20,062, i.e., by 461 votes. The Board certified Stinson as the winner of the election.

On November 22, 1993 Marks, the Republican State Committee and Kathy Steck filed a complaint in the United States District Court for the Eastern District of Pennsylvania against William Stinson, the William Stinson Campaign, the Board and its Commissioners, Margaret M. Tartaglione, John F. Kane and Alexander Z. Talmadge, Jr. On December 22, 1993, an amended complaint was filed. Seven minority voters joined in the amended complaint, which alleged violations of the Civil Rights Act and the Voting Rights Act.

After four days of hearing on a motion for a preliminary injunction, the district court, on February 17, 1994, issued an opinion finding a pervasive scheme of fraud and wrongdoing by defendants with respect to the obtaining of absentee ballots. It issued a preliminary injunction that: (1) ordered the Board in the future to deliver absentee ballot packages directly to voters, by mail or by hand, and to accept delivery of completed absentee ballots only from the voter in person or by mail, as required by law; (2) ordered the Board to cease discriminatory practices and to distribute absentee ballot materials, at least in the district in question, printed both in Spanish and in English; (3) enjoined Stinson from serving

as state Senator; and (4) ordered the Board to certify the election based on the machine vote total.

Stinson and the Board appealed to the Third Circuit. Petitioners, ten absentee ballot voters in the special election, filed a mandamus petition, which the Third Circuit treated as a motion to intervene and granted. On March 16, 1994, the Third Circuit issued an order and opinion which upheld every provision of the preliminary injunction but one, that ordering the election winner to be certified on the machine vote totals. *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (*"Marks I"*).

The Third Circuit instructed the district court as to further proceedings on remand:

> [T]he district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for the wrongdoing. See e.g. Curry v. Baker, 802 F.2d 1302 (11th Cir.), stay dismissed, 479 U.S. 1301, cert. [dismissed], 479 U.S. 1023 (1986).

Id. at 889 (footnote omitted). The Third Circuit authorized the district court to certify a candidate as a winner even if a precise count of valid votes could not be made and pointed out how this might be achieved:

> We do not suggest that such a finding would have to be made with mathematical precision. Courts, *with the aid of expert testimony*, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. See e.g. Curry, 802 F.2d at 1317-19. What is required is evidence and an analysis that

> demonstrate that the district court's remedy is worthy of the confidence of the electorate.

Id. at 889 n.14 (emphasis added).

After remand from the Third Circuit, the final hearing commenced on March 28 and lasted nine days. On April 26, 1994, the district court issued an opinion and order.

In its opinion the district court found that the Board and Stinson —

> engaged in a conspiracy for the purpose of denying hundreds of voters in the Second Senatorial District, specifically Latinos and African-Americans, Bruce Marks, and the Republican party of rights and privileges as set forth in the Constitution and laws of the United States and of the Commonwealth of Pennsylvania. The conspirators intentionally engaged in a plan to promote the Democrat candidate by illegally soliciting and processing absentee ballots to help ensure that William Stinson would receive a plurality of votes in the highly contested Special Election in the Second Senatorial District.

Marks v. Stinson, Civil Action No. 93-6157, 1994 U.S. Dist. LEXIS 5273, (E.D. Pa. Apr. 26, 1994) ("*Marks II*"), slip op. at 67 (conclusion of law 4). The findings of fact establishing this conclusion are summarized below with references to the specific findings, which appear in the district court's opinion reproduced in Appendix B to the Petition For Writ of Certiorari.

Under Pennsylvania law, a qualified elector may vote by absentee ballot if he or she is, *inter alia*, absent from the Commonwealth or county of residence "because his duties, occupation or business require him to be elsewhere during the entire period the polls are open" or is physically unable to go to the polls. 25 P.S. §3146.1(j) and (k). An elector who wishes to vote

by absentee ballot must submit to the appropriate Board an absentee ballot application, including a statement that the elector expects to be out of the county on election day or that the elector is physically unable to go to the polls, with a declaration stating the nature of the disability and the name, address, and telephone number of the attending physician. 25 P.S. §3146.2(a) and (3)(1) and (e)(2). (FF 9-10)

Absentee ballots applications are processed by the Board to determine if the applicant possesses all necessary qualifications. If the Board concludes that the applicant is not qualified, it must immediately notify the applicant. 25 P.S. §3146.2b(d). After approving an absentee ballot application, the Board is required to "mail or deliver" an absentee ballot package to the elector at the address listed on the application. The Board may not deliver it to any other person. 25 P.S. §3146.5. (FF 15, 16, 21, 22)

The elector must mark the ballot "in secret," seal the ballot in an inner envelope, seal the inner envelope in a declaration envelope, and execute the declaration on the declaration envelope. 25 P.S. §3146.6(a). An elector may legally receive assistance in filling out the absentee ballot only if the elector has a physical disability that "renders him unable to see or mark ... the ballot." 25 P.S. §3146.6(a). The elector must "send by mail" or deliver "in person" the executed declaration package to the Board. 25 P.S. §3146.6. If an elector who sent in an absentee ballot becomes able to get to the polls on election day, the absentee ballot is void as a matter of law, and the elector has a duty to go to the polls and void the ballot. 25 P.S. §3146.6(b). (FF 22, 24, 26)

The Stinson campaign sent its workers into areas where a majority of the residents were white to solicit voter registration applications and absentee ballot applications. The goal was to obtain twenty absentee ballot applications from each division. (FF 53) Those who expressed hesitancy to register because they did not wish to go to a polling place were told by campaign workers that they could fill out an absentee ballot application and obtain an

absentee ballot as a matter of convenience. (FF 64) Many improper applications were received based on this misrepresentation. (FF 64) To conceal the fact that many of these improper absentee ballot applications were solicited several months before election day, the Stinson campaign workers told canvassers not to fill in the true date on the application. (FF 54, 66) The applications that the Stinson campaign obtained in this way were then submitted directly to Commissioner Tartaglione's office and over 500 corresponding absentee ballot packages were provided from her office directly to the Stinson campaign. (FF 53-57, 76) Stinson was aware of the improper conduct regarding the absentee ballots, yet he permitted the conduct to continue and even admonished a campaign worker who questioned its legality. (FF 62, 66, 67, 71, 72, 76)

About three weeks before the election, the Stinson campaign learned that a poll showed Marks running ahead of Stinson. (FF 83) The campaign responded by saturating Hispanic and African-American areas of the district with absentee ballot applications using tactics similar to those earlier employed. (FF 84) This time, however, campaign workers soliciting absentee ballot applications told Hispanic and African-American voters that there was a "new way to vote" from the convenience of one's own home. (FF 91) The absentee ballot applications from the minority sections of the district were then delivered by Stinson campaign workers directly to Commissioner Talmadge's office. (FF 83-103, 105, 123-25, 127, 131-32)

The Democrat Commissioners, Tartaglione and Talmadge, and Board employees working with them were aware of the absentee ballot campaign of Stinson and his workers and assisted that campaign by delivering hundreds of absentee ballot packages directly to Stinson workers rather than mailing or delivering them, as required by law, to the electors whose names and addresses appeared on the applications. (FF 50, 143) This assistance was designed to aid the Stinson campaign in obtaining more votes through personal contact between the electors and the Stinson

campaign workers. (FF 97) The Board's assistance to the Stinson campaign was covert and was disclosed neither to Republican Commissioner Kane nor in public meetings. (FF 43, 44, 50, 55-56, 61, 94-97)

After illegally obtaining absentee ballots from the Commission, the Stinson campaign used them in a variety of ways. Stinson campaign workers took the absentee ballots directly to applicants' homes where improper influence was exerted over voters. (FF 98) In numerous instances, Stinson workers executed applications, ballots, and declarations without the voter understanding the nature of the document. (FF 98) In other instances, Stinson workers instructed the voter to check certain places on the ballot, or filled out and forged the ballot. (FF 98) Voters were also assisted in completing applications and declaration packages after the statutory deadline for receipt by the Board had passed, and such ballots were counted by the Board. Many voters who cast absentee ballots testified that they were unaware that they had signed absentee ballot applications. (FF 62, 67, 98, 99, 100)

In one program targeted at minority voters, the Stinson campaign paid its workers $1.00 per absentee ballot that they could obtain for William Stinson. (FF 107) The Stinson campaign thus obtained and delivered to the Board approximately 600 ballots, most, if not all of which, were cast for Stinson. (FF 104-115) In non-minority areas, approximately 450 absentee ballots in favor of Stinson were obtained illegally by the Stinson campaign. (FF 63)

Although the Board cooperated with the Stinson campaign's illegal handling of ballots, there was no evidence that voters relied on representations by the Board in voting by absentee ballot when they were not qualified to do so. Instead, the Board's written instructions on the application and in the absentee ballot package, in Spanish and English, make clear that a voter in the county must go to the polls. There was no evidence to suggest that any voters returned their absentee ballots through party committee persons or Stinson campaign workers based on representations by the Board.

Instead, the written instructions of the Board make clear that a voter must either mail or deliver the completed ballot "in person" to the Board. These instructions are the only published information provided to the public and voters on the absentee ballot process. (FF 22, 134)

In response to the Third Circuit's direction that expert testimony might be of use, three experts in statistics and/or survey research testified at the final hearing: one called by Plaintiffs; one called by Petitioners; and one appointed by the court. The court found the methodology and testimony of each of the three experts independently established to a reasonable degree of scientific certainty that Marks would have won a plurality of the illegal votes cast in the November 1993 special election if the wrongdoing had not occurred and the voters who cast illegal absentee ballots had gone to the polls at the established turn-out ratios. (FF 211) The district court found certification of Marks as the winner of the special election worthy of the confidence of the electorate. (FF 211) These ultimate findings were based on the following findings by the district court with respect to the expert testimony.

A survey of absentee voters in the special election was conducted by workers associated with the Marks campaign shortly after the election. Dr. Brian Sullivan, an expert in econometrics and survey research, reviewed the survey. Dr. Sullivan conducted numerous verifications and statistical adjustments to the survey data. In light of his review procedures, the Court found that the data were reliable. (FF 165-172) Using these data, together with other election statistics, the total illegal absentee ballots cast in the election can be allocated to each candidate. As shown by Dr. Sullivan's method of statistical allocation, Stinson received 1,138 illegal absentee ballots and Marks received 257 illegal absentee ballots. (FF 175-176) This methodology demonstrates that Marks won the election by at least 420 votes. This methodology provides a reliable result since it removed illegal absentee ballot votes from Marks' total, even though the Marks campaign was not engaged in

any illegal conduct, scheme or conspiracy regarding absentee ballots. (FF 177)

These data also support a statistical method to reallocate back to each candidate the number of votes that he would have received but for the wrongdoing of the defendants. (FF 178-182) This "recapture" methodology shows that Marks would have won the election by 416 votes but for the wrongdoing of defendants. It gives the benefit of doubt to Stinson on this issue by, again, removing a certain number of absentee ballot votes from Marks, even though the Marks campaign did not engaged in any illegal conduct regarding absentee ballots. (FF 184) The results determined from the survey data described above are to a degree of statistical reliability that exceeds 99%, based on a determination of standard deviations and statistical confidence levels. (FF 185)

Petitioners' expert, Dr. Paul Shaman, created tables showing, for each of a series of ranges of possible combinations of improper votes, the probability that Marks won the election. (FF 188) Without using some specific data, one cannot select an appropriate range in any of Dr. Shaman's tables. Data, however, exist which can be used with Dr. Shaman's probability tables to determine the probability of a Marks victory. Given that at least 1,000 ballots were illegally delivered to voters by the Stinson campaign and returned to the Board as Stinson votes, the probability of a Marks win is 100% according to Dr. Shaman's tables. This is so even if 30% of the 1,000 ballots are deemed "recaptured" and entirely allocated to Stinson, which would overcompensate him in correcting for the effects of his own wrongdoing. (FF 190) *See also* FF 63 (450 illegal non-minority area ballots) and FF 104-16 (600 illegal minority area ballots).

The analysis of survey research conducted by Plaintiffs' expert, Dr. Sullivan, also provide data that can be used with Dr. Shaman's tables. These data also show a 100% probability of a Marks win. (FF 191-192)

Dr. Orley Ashenfelter, the court-appointed expert, analyzed data on the machine and absentee votes for each candidate in the last twenty-one elections for the state Senate in Philadelphia. Using regression analysis, Dr. Ashenfelter quantified the relationship between absentee votes and machine votes in these elections and compared it to the absentee and machine vote relationship in the November 1993 special election. (FF 199-201) Regression analysis shows that, if the 1993 election had been consistent with the historical relationship between machine and absentee voting, Marks would have received an overall victory margin ranging from 697 to 800 votes. (FF 202-204) The actual difference in absentee votes between the candidates in the 1993 election was more than three standard deviations larger than the expected result. (FF 203) The record establishes one predominant reason for this large difference in 1993 from historically and statistically expected relationships: the pervasive scheme of the defendants to obtain absentee ballots for Stinson through illegal and discriminatory means. (FF 207)

Based on its findings of pervasive election fraud involving the election officials conspiring with the Stinson campaign, the district court, *inter alia*, enjoined the Board from distributing official absentee ballot material to any candidates or their representatives and ordered that absentee ballot packages either be mailed or hand delivered; enjoined the Board from receiving any absentee ballot materials from anyone other than the voter; ordered the Board to maintain all official absentee ballot applications and other ballot materials in its possession for public access; enjoined the Board from delivering or returning such records to any political parties, candidates or their representatives; enjoined the Board from employing discriminatory practices which involve applying the Pennsylvania Election Code or any other law in a manner that favors or disfavors a candidate; and ordered the Board to take all steps necessary to enforce the terms of the district court's order and to comply with the Pennsylvania Election Code and other laws. Based on the unchallenged machine vote count, together with the survey research and statistical projections of the three experts, the

court also ordered the Board to recertify the special election "based on the finding and conclusion that Bruce S. Marks received a PLURALITY of the legally cast votes, or in other words, that Bruce S. Marks would have won the election BUT FOR the wrongdoing."

Petitioners, the Board, Stinson, Talmadge and Tartaglione filed immediate appeals from the district court's permanent injunction. On April 28, 1994, the Third Circuit denied motions for stay but granted motions for expedited appeal. On August 18, 1994, the Third Circuit issued a memorandum opinion and order affirming the district court's April 26, 1994 permanent injunction. *Marks v. Stinson*, Docket Nos. 94-1474, 94-1475, 94-1476, 94-1481 and 94-1482, 1994 U.S. App. LEXIS 28021, (3d Cir. Aug. 19, 1994) ("*Marks III*").

While this federal litigation was ongoing, a proceeding was underway in the Pennsylvania Senate. On January 20, 1994, Marks filed a petition for an election contest with the President *pro tempore* of the Pennsylvania Senate, pursuant to section 1747 of the Pennsylvania Election Code, 25 P.S. §3407, and article II, section 9 of the Pennsylvania Constitution. The petition was referred to the Senate Committee on Rules and Executive Nominations on January 31, 1994. The Committee appointed a subcommittee on the election contest. On February 7, 1994, the subcommittee adopted a pleading schedule. Both Marks and Stinson submitted filings pursuant to the schedule. The subcommittee notified Marks and Stinson on April 26, 1994, that it would hear oral argument on April 27, 1994. Counsel for Stinson did not appeal at oral argument. On April 28, the subcommittee issued a report to the Senate, concluding that Marks would have been the winner of the election in the absence of the extensive wrongdoing perpetrated by the Stinson campaign and the Democrat members of the Philadelphia Board of Elections. On April 28, 1994, the Senate of Pennsylvania adopted a resolution declaring Marks the winner of the November 1993 special election. Pursuant to the resolution,

Marks was administered the oath of office and seated as a member of the Senate on April 28, 1994.

The Senate term which was to be filled in the November 1993 special election ended November 30, 1994. The general election to fill the second district state senatorial seat for a full term (four years) was held November 8, 1994. The four-year term of the winner of that election began December 1, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The question raised by the petition is moot.

The question Petitioners raise takes issue with that portion of the district court's remedy that ordered the Board to certify Marks as the winner of the special election. That portion of the remedy was specific to the November 8, 1993 special election and the remainder of the term the special election was held to fill.

The Senate of Pennsylvania, pursuant to its constitutional and statutory authority, resolved the election contest filed by Marks in his favor on April 28, 1994. The Senate concluded that Marks was the winner of the special election. No challenge was made to the Senate's determination and Marks served the remainder of the term the special election was held to fill, which ended November 30, 1994.

A new state Senator was elected in the general election held on November 8, 1994 to represent the second district. In accordance with Pennsylvania law, her term as state senator began December 1, 1994.

As a result of these events, the relief Petitioners requested from the district court, a new election or the declaration of a vacancy, cannot be provided. No decision that this Court could make with

respect to the question raised by Petitioners can change either the April 1994 decision of the Pennsylvania Senate or the November 1994 decision of the people. Petitioners have no legally cognizable interest that can be affected by a decision of this Court.

This case does not now present this Court with a live case or controversy and is, therefore, moot. Article III of the United States Constitution does not permit this Court to provide advisory opinions, which is all this Court could give with respect to the question presented.

A similar situation arose in *Hall v. Beals*, 396 U.S. 45 (1969), which involved a class action challenging the Colorado six-month residency requirement for voting. After this Court noted probable jurisdiction of the case, the Colorado legislature reduced the residency requirement from six months to two months and the 1968 election was held. This Court concluded the case was moot because (1) it was impossible to grant the relief that had been sought, (2) the appellants had then satisfied the residency requirement, and (3) most importantly, the six month residency stature was no longer in effect. This Court held: "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Id.* at 48.

Here, as in *Hall*, it is impossible for the relief requested by the Petitioners in district court to be granted.

The Court also considered in *Hall* whether the case was one which fell within the exception to the mootness doctrine of capable of repetition, yet evading review. It concluded it was not, because the same restriction on voting would not affect the petitioners again and because the state had altered its statutory scheme to the benefit of those who at the next election would be similarly situated to the petitioners.

Here, as in *Hall*, this case is not one that is capable of repetition, yet evading review. This Court, in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), stated that such an exception to the mootness doctrine, in the absence of a class action —

> was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

This case is not a class action and meets neither of these two requirements.

In the first instance, the district court's order directing the Board to certify the winner of the special election, while evading review here because the term filled by the special election has ended, would easily be reviewable if it occurred after a general election for a full four-year term. And a general election is the situation Petitioners posit to this Court in their Petition.

Furthermore, it is highly unlikely that Petitioners would be subject to the same action again. As noted *supra* in the Statement of the Case, the situations where Pennsylvania law permits voting by absentee ballot, e.g., illness and absence from the county on business, are temporary. For Petitioners to be subject to the same action again would not only require that they again vote by absentee ballot, but also that there be massive fraud in the absentee ballot process and an election that turns on the absentee ballot count. This is not a situation such as was present in *Dunn v. Blumstein*, 405 U.S. 330 (1972), a class action where the complaining class would continue to be subject to the challenged durational residency requirement at the next election and would therefore continue to be disenfranchised.

Although Petitioners here were not disenfranchised, even their own interpretation of the consequences of the case shows that they, at most, suffered a temporary disenfranchisement that did not rise to the level of a constitutional violation of their right to vote. Any disenfranchisement they may have suffered was temporary and ended on November 8, 1994 when they had the opportunity to vote in the general election for state senator for the second district.

Furthermore, even if this issue were not moot, it does not offer this Court a sufficiently robust controversy. Petitioners were intervenors in the case who, at their own choice and insistence, were not aligned with either side of the litigation. None of the losing defendants joined in the petition or filed a petition of their own. The question presented deals with only one aspect of the relief — the portion that directly impacted on the candidates in the special election. Neither candidate has any interest in that relief at this point. A new state senator was elected as the state senator from the second district on November 8, 1994, and her term began on December 1, 1994. This is not the context in which this Court should exercise its authority.

2. The question raised by Petitioners asks this Court to rule on the propriety of a remedy in a unique factual situation; it presents neither an important question of federal law nor a question of federal law that should be settled by this Court.

Petitioners fail to point out certain facts that make this case unique, and they misinterpret the opinions of the district court and the Third Circuit. The election in this case, as noted by Petitioners, was a special state election to fill a vacancy in the Pennsylvania State Senate for state's second senatorial district. However, to understand the situation before the district court and the appropriateness of the remedy provided, further elaboration is essential.

Petitioners' assertion that the district court did not make a finding as to the actual number of illegal absentee votes ignores findings of fact nos. 63 and 114. In finding of fact no. 63, the district court found that approximately 450 absentee ballots were returned to the Stinson campaign and delivered to the Board from the non-minority areas of the district, in violation of Pennsylvania law. In finding of fact no. 114, the district court found that over 600 absentee ballots were returned to the Stinson campaign and delivered to the Board from the minority areas of the district. This totals to over 1,050 illegal absentee votes. The numbers of illegal absentee votes predicted by expert witnesses Drs. Ashenfelter and Sullivan are consistent with this number. Dr. Ashenfelter estimated illegal absentee votes in the range of 1,158 to 1,261 and Dr. Sullivan projected 1,395. Also, using the district court's number of illegal absentee votes with the probability tables of Petitioners' own expert Dr. Shaman shows a 100% probability that Marks would have won the special election but for wrongdoing.

Petitioners assert the Third Circuit concluded in its decision on the appeals from the district court's preliminary injunction, *Marks I*, that Petitioners had been "unconstitutionally disenfranchised by the district court" when the district court ordered the winner of the election to be certified based solely on the voting machine tally. This is incorrect. The Third Circuit did not conclude that Petitioners nor any other absentee voter had been unconstitutionally disenfranchised. Nor, based on Third Circuit precedent, could the Third Circuit have done that.

The Third Circuit instructed the district court that it had to consider how many absentee voters would have gone to the polls but for the misconduct and what impact that would have had on the results of the election. *See Marks I.* While the Third Circuit mentioned disenfranchisement of the absentee voters, such disenfranchisement would only last until the next election. Under Third Circuit precedent, such temporary disenfranchisement does not rise to the level of a constitutional violation. *See Donatelli v. Mitchell*, 2 F.3d 508 (3d Cir. 1993) (no substantial denial of

fundamental right to vote where state senator is assigned to constituency which did not elect him).

Petitioners also did not inform this Court of the proceeding that took place in the Pennsylvania Senate. As set forth *supra* in the Statement of the Case, Marks, in accordance with Pennsylvania constitutional and statutory law, filed an election contest with the state Senate on January 20, 1994. On April 28, 1994, the state Senate reached a decision consistent with that of the district court, i.e., that but for the wrongdoing Marks would have won the special election, and had Marks sworn in as the state Senator from the second district.

When these missing facts are supplied and the misinterpretations of the underlying district court and Third Circuit decisions are corrected, it is apparent that this is a unique fact situation. It is also apparent that, in light of the gross and pervasive official misconduct, the remedy is appropriate. The district court did not appoint Marks state senator, the voters of the second district elected him. The court removed the obstacles to his seating that the conspirators erected.

Another fact not pointed out by Petitioners that sheds light on the unimportance of the question presented is that the Third Circuit decision, *Marks III*, which affirms the district court's final injunction order and is the decision supporting the judgment Petitioners seek to have reviewed, is an unpublished memorandum decision. Under the Third Circuit's Internal Operating Procedures, §5.1.2, its memorandum opinions have no precedential value.

A case that is not precedential does not present the important federal question that Petitioners argue exists. This case presents a unique fact situation that is unlikely to occur again. It does not present an important federal question which this Court should consider.

CONCLUSION

For the foregoing reasons, the question presented by Petitioners does not present a certiorari worthy question and the Petition for Writ of Certiorari should be denied.

December 6, 1994

Respectfully submitted,

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SUPREME COURT, U.S.
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(3)

No. 94-814

In The

Supreme Court of the United States

October Term, 1994

IDA DOUGHERTY, DANIEL J. SEARS, JOSEPHINE MARTIN, MARY MARTIN, JOSEPH J. JORDAN, ANNE JORDAN, MARY SULLIVAN, MARY MENDOLOSKI, ANNA HAGAN, AND ROBERT LES,

Petitioners,

vs.

BRUCE S. MARKS, KATHY STECK, EMANUEL LORENZO, LYDIA COLON, LILLIAN CRUZ, DIANA IRIZARRY, RUTH MARTINEZ, ZORAIDA RODRIGUEZ, YESENIA VASQUEZ, AND THE REPUBLICAN STATE COMMITTEE,

-and-

WILLIAM STINSON, THE WILLIAM STINSON CAMPAIGN, AND THE PHILADELPHIA COUNTY BOARD OF ELECTIONS (MARGARET M. TARTAGLIONE, JOHN F. KANE, ALEXANDER Z. TALMADGE, JR.),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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In their Brief in Opposition, respondents urge this Court to deny the petition for a writ of certiorari because the issue presented is moot. Respondents argue that because the Republican controlled Pennsylvania Senate resolved respondent Bruce S. Marks' election contest in favor of Marks (a Republican) on April 28, 1994 and because a general election was held on November 7, 1994 (an election which respondent Marks lost), the question presented by petitioners (legitimate absentee ballot voters) is moot. Respondents' suggestion of mootness should be rejected.[1]

To start, respondents neglect to inform this Court that the United States Court of Appeals for the Third Circuit considered whether the resolution of Marks' election contest by the Pennsylvania Senate rendered the case moot, and concluded that it had not. *Marks v. Stinson*, Nos. 94-1474, 94-1475, 94-1476, 94-1481 and 94-1482 (3d Cir.) ("*Marks II*") at 6 n. 2, App. at A6-7. The Pennsylvania Senate has agreed at every juncture in this litigation to yield to and abide by whatever rulings were made by the federal courts, thus leading the Third Circuit to conclude that "a reversal by this court might lead the Senate to reverse its position [thus giving petitioners] effective relief...." *Id.*

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[1]Petitioners note that respondents have, at every turn in this litigation, fought to keep petitioners from being heard. Respondents fought petitioners' mandamus petition (which was treated by the Third Circuit as a motion to intervene and was granted); respondents fought petitioners' intervention in the district court on remand from the Third Circuit; and, respondents fought petitioners in the Third Circuit on appeal from the decision to certify Marks, the loser of the November 2, 1993 special election as the winner thereof. Respondents now fight petitioners in this Court. Petitioners have only been interested in protecting the fundamental right to vote (the right from which all other rights flow), and find it curious that respondents have fought so hard to keep petitioners from even being heard with respect to that important right.

Next, while respondents recognize that there exists an exception to the mootness doctrine, they simply make the bald conclusion that the exception does not apply. An analysis both of the exception and the facts *sub judice* make clear that the exception does apply.

It is well established by this Court, and correctly stated by respondents, that federal jurisdiction will extend to cases and controversies which have been rendered moot during the course of the litigation if two circumstances are present:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)).

The challenged action in this case was simply too short in duration to be fully litigated.[2] This Court's discussion of the applicability of the mootness doctrine contained in *Roe v. Wade*, 410 U.S. 113 (1973), is instructive. In rejecting a claim that Roe's constitutional challenge to a Texas abortion criminal statute was moot, this Court first noted: "Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy...." *Id.* at 124. This Court went on to state:

> The usual rule in federal cases is that an actual controversy must exist at stages of appellate or

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[2]Importantly, that the case was not moot at the time the Petition for a Writ of Certiorari was filed. The case did not become moot until November 7, 1994 when respondent Marks lost his bid for the position of senator of Pennsylvania's Second Senatorial District.

> certiorari review, and not simply at the date the action is initiated. But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Id. at 125 (citations omitted).

This Court should not resolve the mootness question presented *sub judice* any differently that it resolved the mootness question in *Roe v. Wade*. Here, the term of the election was a significant fact in the litigation, and was a period so short that it passed prior to completion of the appellate process. Here, unless this Court takes review of this case, federal courts will remain free to declare the losers of state elections the winners thereof in the absence of mathematical certainty that the loser in fact won the election. Moreover, terms of office (even following a general election and not only following special elections to fill a vacancy for an unexpired term) will likely expire prior to review by this Court. The improper intrusion into state electoral affairs by the federal court here "truly could be 'capable of repetition, yet evading review.'" *Id.* In addition, and contrary to respondent's assertions, it is not "highly unlikely that Petitioners would be subject to the same action again." Brief in Opposition at 14.

As respondents full well know, many of the Petitioners (*e.g.*, Ida Dougherty, Mary Sullivan and Mary Mendoloski) are elderly, disabled women who voted by absentee ballot in the November 2, 1993 Special Election, and who had voted by absentee ballot in many prior elections on account of their disabilities. Thus, that which caused them to vote by absentee ballot in the November 2, 1993 special election was not "temporary." Brief in Opposition at 14. Accordingly, any future declaration by the federal court in the Eastern District of Pennsylvania that the loser of a state election should be declared the winner thereof, without mathematical certainty that the loser would have won, most certainly would subject at least three petitioners to the same action again -- *to wit*, a court-imposed and court-selected governmental representative.

The principal case relied upon by respondents in support of their mootness argument, *Hall v. Beals*, 396 U.S. 45 (1969), is inapposite. The only similarity between *Hall* and the instant case is that both deal with elections. *Hall* involved a constitutional challenge to a Colorado six-month residency requirement. By the time the case was decided by this Court, the election at which petitioner therein had wanted to vote had passed and petitioner therein had satisfied the six month residency requirement. However, the linchpin to this Court's finding of mootness was that, following the challenge to the six month residency requirement, the Colorado Legislature changed the residency requirement from six months to two months. Under the new residency requirement law, there was no case or controversy:

> We review the judgment below in light of the Colorado statute as it now stands, not as it once did. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid

> advisory opinions on abstract propositions of law.

Id. at 48. In the case *sub judice*, the absence of a present, live controversy is a function only of the fact that the challenged action was, in its duration, too short to be fully litigated before its expiration -- a fact that will not foreclose review by this Court of the important constitutional question presented.

If this Court dismisses the petition for a writ of certiorari as moot, then nothing will stop the federal courts from again transforming the losers of state elections into the winners thereof. All future appellate challenges to such federal court action would likewise be dismissed as moot and thus the issue presented would always evade review by this Court. Further, at least three of the petitioners *sub judice* would again be subjected to the unlawful judicial interference with state elections.

Accordingly, and for all of the reasons previously stated, a writ of certiorari should issue to correct the opinion and judgment of the United States Court of Appeals for the Third Circuit, dated August 18, 1994.

Respectfully submitted,

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